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## Stop the Presses: Reporter-Source Confidentiality Agreements and the Case for Enforcement

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## NOTES

### STOP THE PRESSES: REPORTER-SOURCE CONFIDENTIALITY AGREEMENTS AND THE CASE FOR ENFORCEMENT

Stories of heroic reporters sacrificing their freedom by going to jail to protect confidential sources present interesting and difficult questions about the unique role of the press in our society.<sup>1</sup> There is, however, a closely related and converse problem, which commentators have not often discussed, that presents a similar legal issue. When a reporter, contrary to a prior agreement with his or her source, chooses to publish information that he or she agreed to keep confidential, it is unclear whether the source may successfully sue the reporter for breach of contract.<sup>2</sup> This issue presents a particularly interesting and important question because it involves a clash between the need to enforce private agreements and compensate private harms on the one hand, and the need to extend special protection to the press under the First Amendment on the other.<sup>3</sup>

Courts must consider several competing factors in determining whether to enforce reporter-source confidentiality agreements.<sup>4</sup> Under traditional contract law, the agreements might very well contain all the requisite elements of a binding contract.<sup>5</sup> Reporter-

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<sup>1</sup> See generally Vince Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971).

<sup>2</sup> See, e.g., *Cohen v. Cowles Media Co.* ("Cohen I"), 445 N.W.2d 248, 254 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("Cohen II"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("Cohen III").

<sup>3</sup> See generally Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553 (1989).

<sup>4</sup> See generally *id.*

<sup>5</sup> *Cohen II*, 457 N.W.2d at 202.

source agreements, however, are often oral and vague in their terms, thus making their interpretation difficult.<sup>6</sup> Also, a court might question whether the parties to such agreements intend to be legally bound rather than simply morally bound.<sup>7</sup> Moreover, aside from these traditional contract issues, courts must consider whether to apply the doctrine of promissory estoppel when a source has reasonably and detrimentally relied upon a reporter's promise of confidentiality.<sup>8</sup>

In addition to contract issues, reporters faced with breach of contract actions have raised First Amendment issues as well.<sup>9</sup> The First Amendment, however, only prohibits *state* action that restricts press freedom and does not affect similar actions by private individuals.<sup>10</sup> Further, in certain circumstances, persons may effectively waive their First Amendment rights.<sup>11</sup> Finally, even if state action was present and no waiver existed, courts must weigh First Amendment concerns against the need to enforce the contract.<sup>12</sup>

A 1991 United States Supreme Court case, *Cohen v. Cowles Media Co.*,<sup>13</sup> is the leading decision among the few that have addressed the issue of the enforceability of reporter-source confidentiality agreements.<sup>14</sup> In that case, the Minnesota Supreme Court

<sup>6</sup> *Id.* at 203; see also Richard J. Tofel, *Under Inspection*, NAT'L L. J., March 12, 1990, at 13, 14. That an agreement is oral does not alone generally make it unenforceable, but the fact that reporter-source agreements have traditionally been oral has been said to cause uncertainty with respect to the specific terms agreed upon. See Tofel, *supra*, at 14.

<sup>7</sup> *Cohen II*, 457 N.W.2d at 203 (court stated that "a moral obligation alone will not support a contract"); see also Tofel, *supra* note 6, at 13 (commentator likened the reporter-source promise to the traditionally unenforceable promise to marry).

<sup>8</sup> *Cohen II*, 457 N.W.2d at 203-05; *Cohen v. Cowles Media Co.* ("*Cohen III*"), 111 S. Ct. 2513, 2517-20 (1991). Promissory estoppel is an equitable remedy that has been applied where a binding contract could not otherwise be found. See *infra* notes 116-39 and accompanying text for a discussion of promissory estoppel.

<sup>9</sup> See, e.g., *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1295-1301 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991); *Cohen II*, 457 N.W.2d at 204.

<sup>10</sup> *Ruzicka*, 733 F. Supp. at 1295; *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 254 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>11</sup> *Erie Telecommunications, Inc., v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988); *Ruzicka*, 733 F. Supp. at 1296-98; *Cohen I*, 445 N.W.2d at 258.

<sup>12</sup> *Ruzicka*, 733 F. Supp. at 1298-99; *Cohen II*, 457 N.W.2d at 205; *Cohen I*, 445 N.W.2d at 256-58.

<sup>13</sup> *Cohen III*, 111 S. Ct. at 2520.

<sup>14</sup> Only a few other courts have dealt in any way with this issue. See *Ruzicka*, 733 F. Supp. at 1293 n.2. In *Ruzicka*, a sexual assault victim sued a magazine for revealing her identity. *Id.* at 1292. See *infra* notes 70-91 for a discussion of that case. See also *Doe v. ABC*, 543 N.Y.S.2d 455, 455 (N.Y. App. Div. 1989). In *Doe v. ABC*, rape victims sued a television station for breach of contract and negligent infliction of emotional distress after an alleged

held that the enforcement of such a confidentiality agreement would impermissibly burden the newspaper's First Amendment rights.<sup>15</sup> On certiorari, however, the United States Supreme Court held that a court's enforcement of the agreement under a promissory estoppel theory would not violate the newspaper's First Amendment rights.<sup>16</sup>

Section I of this note briefly introduces the seminal cases involving reporter-source breach of contract actions.<sup>17</sup> Section II discusses the contractual issues, including promissory estoppel, ad-

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failure of the station to protect the plaintiffs' anonymity. *Id.* at 456 (Rosenberger, J., dissenting). The court summarily affirmed the judgment below, which denied the defendants' motion for summary judgment on the contract claim. There was no discussion by the court, however, of its reasoning as to the contract claim. *Id.* at 455-56. *Virelli v. Goodson-Todman Enters.*, 536 N.Y.S.2d 571, 577 (N.Y. App. Div. 1989), involved a suit brought against a newspaper, reporter and publisher for invasion of privacy, negligence and intentional infliction of emotional distress; the suit alleged that the newspaper made the plaintiffs, interviewees for a drug article, identifiable. *Id.* at 572-73. It did not, however, involve a breach of contract claim and is therefore beyond the scope of this note. In *Huskey v. NBC*, 632 F. Supp. 1282, 1294 (N.D. Ill. 1986), a prisoner brought an action against NBC alleging invasion of privacy and breach of the company's contract to abide by federal regulations prohibiting nonconsensual photographing of inmates. *Id.* at 1285. The decision established only that the prisoner had stated a cause of action under Fed. R. Civ. P. 12(b)(6) and that the defendant was required to answer. *Id.* at 1294. *Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 41 (Cal. Ct. App.), *cert. denied*, 444 U.S. 984 (1979), involved a suit by a psychologist against a member of a therapy group who published a novel allegedly disclosing facts about the therapy sessions in violation of a written agreement. *Id.* at 33-34. The court held that a therapist could not prevent a patient from reporting the treatment he or she received. *Id.* at 41. The case is beyond the scope of this note as it dealt with a doctor-patient relationship and involved a separate set of issues. *Cullen v. Grove Press Inc.*, 276 F. Supp. 727, 731 (S.D.N.Y. 1967), was an action for defamation and invasion of privacy brought by officers of a correctional facility. *Id.* at 728. Among their claims, plaintiffs alleged that the release of a film depicting life in the prison violated an understanding regarding the content and use of the film. The court summarily concluded that the First Amendment provided protection for the film. *Id.* at 731. Finally, *Anderson v. Strong Memorial Hospital*, 573 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991), involved a suit by an AIDS victim against a doctor and a hospital who, as third party plaintiffs, brought a claim against a publishing company for indemnification or contribution. *Id.* at 829. The third party plaintiffs relied on various theories of recovery, including a breach of contract theory. *Id.* The first party plaintiff's claim had been for injuries arising out of the publication of a photograph of the first party plaintiff that allegedly breached an agreement that he would not be recognizable from the photograph. *Id.* at 829-30. The court's discussion of the federal First Amendment issue was brief because the court reasoned that it was compelled by the United States Supreme Court's decision in *Cohen v. Cowles Media Co.* *See id.* at 830. The court did not consider that the Supreme Court's decision was limited to a discussion of promissory estoppel. *See id.* The remainder of the *Anderson* decision discussed the scope of the New York State Constitution's free speech provision and concluded that even the broader state provision could not insulate the third party defendants from the contract cause of action. *See id.* at 831.

<sup>15</sup> *Cohen II*, 457 N.W.2d at 205.

<sup>16</sup> *Cohen III*, 111 S. Ct. at 2520.

<sup>17</sup> *See infra* notes 21-91 and accompanying text.

dressed by courts when considering the enforceability of reporter-source confidentiality agreements.<sup>18</sup> Section III discusses the First Amendment issues raised by these agreements, including state action, contractual waiver and the balancing of First Amendment against contractual interests.<sup>19</sup> Finally, Section IV analyzes the competing contractual and constitutional issues and concludes that the First Amendment should not be applied at all in this area and that, if it is applied, the need to enforce these agreements ultimately outweighs any burden on the First Amendment rights of news organizations.<sup>20</sup>

### I. CASES ANALYZING THE REPORTER-SOURCE CONFIDENTIALITY AGREEMENT PROBLEM: *COHEN* AND *RUZICKA*

*Cohen v. Cowles Media Co.*, a 1991 United States Supreme Court case, is the principal case that confronts and squarely discusses the enforceability of reporter-source confidentiality agreements.<sup>21</sup> In October of 1982, the plaintiff, Dan Cohen, was employed by an advertising agency that worked for Wheelock Whitney, the Republican party gubernatorial candidate in Minnesota.<sup>22</sup> Cohen had obtained court documents regarding two prior arrests of Marlene Johnson, the Democratic party candidate for Lieutenant Governor, and he approached several reporters with this information, including Lori Sturdevant of the Minneapolis Star and Tribune ("Tribune") and Bill Salisbury of the St. Paul Pioneer Press Dispatch ("Dispatch").<sup>23</sup>

Before turning the information over, however, Cohen expressly requested oral assurances from all of the reporters that he would not be named in any resulting stories and that he would not be

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<sup>18</sup> See *infra* notes 92-139 and accompanying text.

<sup>19</sup> See *infra* notes 140-265 and accompanying text.

<sup>20</sup> See *infra* notes 266-340 and accompanying text.

<sup>21</sup> *Cohen v. Cowles Media Co.* ("Cohen I"), 111 S. Ct. 2513, 2520 (1991).

<sup>22</sup> *Cohen v. Cowles Media Co.* ("Cohen I"), 445 N.W.2d 248, 252 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("Cohen II"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("Cohen III"). Whitney was a member of the so-called "Independent Republican" party, as the Republican party is referred to in Minnesota. *Id.*

<sup>23</sup> *Cohen II*, 457 N.W.2d at 200. Johnson was a member of the so-called "Democratic-Farmer-Labor" party, as the Democratic party is referred to in Minnesota. *Cohen I*, 445 N.W.2d at 252. Cohen also contacted Gerry Nelson of the Associated Press and David Nimmer of WCCO Television and gave them the information subject to the same confidentiality requirement. Nelson and the Associated Press honored their promise by not including Cohen's name in its story. WCCO did not run a story at all. *Id.* at 252-53.

questioned regarding his own source.<sup>24</sup> After agreeing to the conditions and obtaining the documents, the two newspapers interviewed Johnson and discovered that the arrests were insignificant.<sup>25</sup> The reporters realized that the insignificance of the arrests might in fact create a "boomerang effect" against the Whitney campaign because of Cohen's close connection to Whitney.<sup>26</sup> In addition, another Tribune reporter searched the original court records and discovered that Gary Flakne, who was known to be a Wheelock Whitney supporter, had checked out the records the day before.<sup>27</sup> When contacted, Flakne informed the reporter that he had obtained the records for Cohen.<sup>28</sup>

Because of the potential boomerang effect and the close connection of Cohen and Flakne to the Whitney campaign, both newspapers reconsidered their promises of confidentiality.<sup>29</sup> The Tribune staff decided that they could not ignore the story altogether without risking accusations of suppressing information damaging to the local Democratic party.<sup>30</sup> Similarly, they also rejected the option of printing the story without Cohen's name and simply describing the source as a Whitney supporter or campaign member.<sup>31</sup> Sturdevant, one of the reporters, expressed strong objections to revealing Cohen's name, but she did agree to try to persuade Cohen to allow the newspaper to include his name.<sup>32</sup> Unsuccessful in these efforts, Sturdevant wrote the story but requested that her name not

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<sup>24</sup> *Cohen II*, 457 N.W.2d at 200. According to the court, Cohen said the following, "in so many words":

I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents.

*Id.*

<sup>25</sup> *Id.* at 200-01, 201 n.2. The first arrest was a 1969 case against Johnson (later dismissed) for unlawful assembly in connection with the candidate's protest of the city's failure to hire minorities for construction projects. The second was a conviction for petit theft involving Johnson's leaving a store with six dollars of merchandise at a time when she was upset over the death of her father. *Id.*

<sup>26</sup> *Id.* at 201 n.2.

<sup>27</sup> *Id.* at 201.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 201 n.2; *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 253 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>30</sup> *Cohen I*, 445 N.W.2d at 253.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

be put on it.<sup>33</sup> On October 28, 1982, the Tribune ran the story with Cohen's name appearing as the source of the information.<sup>34</sup> The story also included the name of Cohen's employer.<sup>35</sup>

The Dispatch staff did not engage in quite so extensive a debate as the Tribune staff had, but the reporter, Salisbury, did raise similar objections to printing Cohen's name.<sup>36</sup> Nevertheless, Salisbury allowed his name to appear as the author of the story that was run on October 28, the same day as the Tribune's story.<sup>37</sup> Later that same day, Cohen's employer confronted him about the articles, and, according to Cohen, the employer fired Cohen.<sup>38</sup> While the employer contended that Cohen resigned, the newspapers conceded that he was fired or at least forced to resign because of the stories.<sup>39</sup>

In response, Cohen brought claims against both newspapers for breach of contract and misrepresentation.<sup>40</sup> As to the breach of contract claim, Cohen claimed that he had entered a binding contract with the newspapers, exchanging information for confidentiality.<sup>41</sup> He asserted that the publication of his name in connection with the stories was a breach of that agreement, and he claimed both compensatory damages (the loss of his job) and punitive damages.<sup>42</sup> The trial resulted in a \$700,000 jury verdict in favor of Cohen.<sup>43</sup>

The newspapers appealed the case to the Court of Appeals of Minnesota ("*Cohen I*"), claiming that the First Amendment barred Cohen's contract claim.<sup>44</sup> Specifically, the newspapers contended that enforcement of the contract would burden the First Amendment by intruding upon the editorial process.<sup>45</sup> Further, they

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 253-54.

<sup>40</sup> *Id.* at 254. The misrepresentation claim is beyond the scope of this note. The trial court found for the plaintiff on this claim. *Id.* The appeals court, however, reversed this result, concluding that because the reporters had intended to perform the contract at the time they entered it, they could not be liable for misrepresentation. *Id.* at 259-60.

<sup>41</sup> See *id.* at 254; *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 200 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>42</sup> See *Cohen I*, 445 N.W.2d at 254.

<sup>43</sup> *Id.* The jury awarded \$200,000 in compensatory damages and \$500,000 in punitive damages. *Id.*

<sup>44</sup> See *id.* at 254, 257.

<sup>45</sup> See *id.* at 257-58.

claimed that such enforcement would burden the First Amendment by restricting the public's access to information.<sup>46</sup> Thus, the newspapers asserted that the First Amendment provides special protection to news organizations immunizing them from contract actions based upon agreements with news sources.<sup>47</sup>

The Minnesota appeals court held that the First Amendment did not apply in the context of a reporter-source contract action because no state action was sufficient to constitutionalize the dispute, and because the newspapers had waived any First Amendment rights by entering the contract.<sup>48</sup> In addition, the court reasoned that even if the First Amendment did apply, the interests favoring enforcement outweighed any burden on the First Amendment.<sup>49</sup> Thus, the court affirmed the jury verdict, holding that the First Amendment does not provide special protection for media defendants in reporter-source contract actions.<sup>50</sup>

The Minnesota Supreme Court ("*Cohen II*"), however, reversed the appeals court's decision regarding the breach of contract claim.<sup>51</sup> The Minnesota high court reasoned first that the special relationship between a reporter and a source could not be subject to the legal rigidity of contract law because reporters and sources do not ordinarily intend their actions to have legal consequences.<sup>52</sup> The court also considered enforcing the agreement under a promissory estoppel theory, whereby a court enforces a promise that is otherwise unenforceable, but that has been relied upon by the promisee.<sup>53</sup> Due to the unique requirements of this doctrine, however, the court concluded that such a substantive theory of enforcement necessarily implicates the First Amendment.<sup>54</sup> In addressing the First Amendment interests, the court concluded that, given the factual circum-

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<sup>46</sup> See *id.* at 257.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 254.

<sup>49</sup> *Id.* at 257.

<sup>50</sup> *Id.* at 257, 262. Note, however, that the appeals court held, for reasons not relevant to this analysis, that the punitive damages should not have been awarded, and thus, Cohen was awarded just the \$200,000 in compensatory damages. *Id.* at 262.

<sup>51</sup> *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 200 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*"). Note that the Minnesota high court affirmed the appeals court's holding as to the misrepresentation claim. *Id.*

<sup>52</sup> *Id.* at 203.

<sup>53</sup> *Id.* at 203-05. The promissory estoppel theory was considered and ruled upon by the Minnesota high court even though the issue was neither tried at the trial level nor raised by either party at any level. *Cohen v. Cowles Media Co.* ("*Cohen III*"), 111 S. Ct. 2513, 2517 (1991).

<sup>54</sup> *Cohen II*, 457 N.W.2d at 205.



stances, such interests outweighed the need for enforcement of the agreement.<sup>55</sup> The Minnesota high court, therefore, reversed the decision of the appeals court and held that the First Amendment barred Cohen's contract action.<sup>56</sup>

On certiorari, the United States Supreme Court ("*Cohen III*") reversed the Minnesota high court and held that the First Amendment did not prevent enforcement of the agreement under a promissory estoppel theory.<sup>57</sup> The Court, of course, did not consider the state law contract issue.<sup>58</sup> Rather, it considered only the promissory estoppel issue because the Minnesota Supreme Court had held that a promissory estoppel remedy was unavailable due to the federal law limitations of the First Amendment.<sup>59</sup> The United States Supreme Court held first that it had jurisdiction to consider the promissory estoppel remedy despite the fact that it was a state law remedy and despite the fact that the issue was neither tried before the trial court nor presented by either party in any of the state courts below.<sup>60</sup> The Court reasoned that the Minnesota high court's decision to deny the promissory estoppel remedy was based upon the Federal Constitution and thus presented a federal question.<sup>61</sup> Moreover, the Court reasoned that the fact that the lower court had decided a federal law issue, whether or not it had been raised and argued by the parties below, was enough to give the Court jurisdiction to decide the matter.<sup>62</sup>

In considering the substantive issue itself, the Court initially held that there was state action involved in enforcement, by a court, under a promissory estoppel theory.<sup>63</sup> The Court reasoned that in the absence of a true contract (which the state court had held did not exist), the promissory estoppel doctrine would create obligations never explicitly assumed by the parties.<sup>64</sup> Because these obligations would be enforced through the official power of the Minnesota courts, the United States Supreme Court concluded that there would be state action sufficient to implicate the First Amendment.<sup>65</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Cohen III*, 111 S. Ct. at 2518-19.

<sup>58</sup> *See id.* at 2517; *see also* *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578, 581 (8th Cir. 1991).

<sup>59</sup> *See Cohen III*, 111 S. Ct. at 2516.

<sup>60</sup> *Id.* at 2517.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2518.

<sup>65</sup> *Id.*

Finally, however, the Court held that the First Amendment considerations were not sufficient to bar a promissory estoppel remedy.<sup>66</sup> The Court reasoned that this case was controlled by a line of decisions holding that generally applicable laws, which have an incidental effect upon the press's ability to gather or report news, do not run afoul of the the First Amendment when applied to the press.<sup>67</sup> In other words, because the state promissory estoppel doctrine did not target or single out the press in any way, the press should not be exempted from its application on First Amendment grounds.<sup>68</sup> The Court, therefore, reversed the Minnesota high court decision and remanded the case for a full consideration of the promissory estoppel remedy.<sup>69</sup>

Only one other case has squarely addressed the issue of the enforceability of reporter-source confidentiality agreements.<sup>70</sup> In

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<sup>66</sup> *Id.* at 2518-19.

<sup>67</sup> *Id.* at 2518. The Court listed several cases in support of the proposition that the First Amendment does not shield the press from various generally applicable laws: *Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Internal Revenue*, 460 U.S. 575, 581-83 (1983) (press not shielded from obligation to pay nondiscriminatory taxes); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-79 (1977) (press not shielded from copyright laws); *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972) (press not shielded from the obligation to respond to a grand jury subpoena); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969) (press not shielded from antitrust laws); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (press not shielded from the Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (press not shielded from antitrust laws); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) (press not shielded from obligation to pay nondiscriminatory taxes); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (press not shielded from the National Labor Relations Act). *Cohen III*, 111 S. Ct. at 2518.

<sup>68</sup> *Cohen III*, 111 S. Ct. at 2518-19.

<sup>69</sup> *Id.* at 2519-20. The Court refused, however, to simply reinstate the trial court's compensatory damage award because it reasoned that the Minnesota Supreme Court's consideration of the state law promissory estoppel remedy may have been truncated by that court's conclusion that the First Amendment barred such a remedy. *Id.*

On remand, the Minnesota Supreme Court reinstated the original jury verdict granting compensatory damages. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 392 (Minn. 1992). The court held that because the promissory estoppel theory was closely akin to the contract theory, it would not be unfair to the defendants for the court to apply the promissory estoppel theory even though it had not been raised at trial. *Id.* at 390. Moreover, the court held that neither Minnesota state constitutional free press protections nor notions of public policy were sufficient to bar enforcement of the agreement. *Id.* at 390-91. Finally, the court reviewed the *Restatement (Second) of Contracts* requirements for promissory estoppel and concluded that the jury verdict could be reinstated, under the promissory estoppel theory, without the necessity of remanding the case for a new trial on the issue. *Id.* at 391-92.

<sup>70</sup> *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1293 (D. Minn. 1990), modified, 939 F.2d 578, 584 (8th Cir. 1991). Once again, the plaintiff's suit involved other claims not relevant to this analysis: fraudulent misrepresentation, invasion of privacy by publication of private facts, false light invasion of privacy, intentional infliction of emotional distress and unjust enrichment. *Id.* at 1292.

1990, the United States District Court for the District of Minnesota, in *Ruzicka v. Conde Nast Publications, Inc.*, held that enforcement of a reporter-source agreement, in which the reporter involved is not apprised of exactly what information may not be published under the agreement, violates the First Amendment.<sup>71</sup>

In *Ruzicka*, a sexual assault victim, Jill Ruzicka, had agreed to allow *Glamour* magazine to interview her for an article on sexual abuse by therapists on the condition that she would not be "identified or identifiable."<sup>72</sup> The reporter, Claudia Dreifus, though not receiving a clear indication of what, beyond the plaintiff's name, could not be published, understood that Ruzicka was concerned about the possibility of her colleagues identifying her from the article.<sup>73</sup> The ensuing article, though not disclosing the plaintiff's name (the name "Jill Lundquist" was used instead), contained a description of the plaintiff and her experiences that allegedly made her identifiable.<sup>74</sup> In addition to a description of her sexual abuse experiences, the article mentioned that she went to law school, that she was now an attorney, and that she served on a task force that drafted a statute criminalizing therapist-patient sex.<sup>75</sup> Ruzicka could not prove that anyone had identified her based on the article.<sup>76</sup>

In 1988, Ruzicka brought an action against the magazine, including a breach of contract claim.<sup>77</sup> She alleged that the details included in the article made her "identifiable" and, as such, violated the confidentiality agreement.<sup>78</sup> The magazine, however, claimed that the First Amendment provided the magazine with special protection from the contract claim.<sup>79</sup>

Granting the defendant's motion for summary judgment, the district court held that a court's enforcement of the agreement would constitute state action thus implicating the First Amendment, and that, on the facts of the case, the magazine had not waived its First Amendment rights.<sup>80</sup> Specifically, the court reasoned that the terms of the agreement did not inform the magazine as to what information could not be published and, therefore, the magazine

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<sup>71</sup> *Id.* at 1301.

<sup>72</sup> *Id.* at 1291.

<sup>73</sup> *Id.* at 1291-92.

<sup>74</sup> *Id.* at 1292.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1291-92, 1298.

<sup>79</sup> *Id.* at 1295.

<sup>80</sup> *Id.* at 1296, 1298.

could not have made a valid constitutional waiver.<sup>81</sup> In its First Amendment analysis, the court considered the constitutional burden that enforcement of the agreement would cause, and concluded that the First Amendment protected the magazine from the breach of contract claim.<sup>82</sup> The court balanced the interests in enforcing the contract against the burden on the First Amendment.<sup>83</sup> Under this balancing test, the court reasoned that, at a minimum, if a reporter-source contract is to be enforced, a plaintiff must show specific, unambiguous terms of agreement in order to protect the First Amendment interests involved.<sup>84</sup> Because Ruzicka was unable to prove such specific and unambiguous terms, the court concluded that the First Amendment required that the agreement not be enforced.<sup>85</sup>

On appeal, the United States Court of Appeals for the Eighth Circuit sidestepped the First Amendment issue, holding that as a matter of Minnesota state law, as set out in *Cohen II*, a contract cause of action is never available in the reporter-source agreement context.<sup>86</sup> The Eighth Circuit stated that it was unnecessary to discuss the district court's reasoning with respect to the First Amendment because the contract claim was precluded under state contract law.<sup>87</sup> The court stated that under Minnesota law, as construed by the Minnesota Supreme Court in *Cohen II*, reporter-source agreements are not enforceable because the parties do not intend to form a binding contract.<sup>88</sup>

Finally, the Eighth Circuit, in *Ruzicka*, also recognized that a promissory estoppel remedy may be available in the reporter-source context.<sup>89</sup> Once again relying on *Cohen*, the court recognized that in narrow circumstances the promissory estoppel remedy may be available even where it was not separately raised at trial.<sup>90</sup> The circuit court, however, did not reach the merits of the promissory estoppel claim; rather, that claim was remanded to the district court for further consideration.<sup>91</sup>

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<sup>81</sup> *Id.* at 1296-98.

<sup>82</sup> *See id.* at 1298-1301.

<sup>83</sup> *Id.* at 1298.

<sup>84</sup> *Id.* at 1300.

<sup>85</sup> *Id.* at 1300-01.

<sup>86</sup> *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578, 582 (8th Cir. 1991).

<sup>87</sup> *Id.* at 582 n.5.

<sup>88</sup> *Id.* at 582.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.* at 583. Here, as in *Cohen*, the plaintiff failed to plead the promissory estoppel theory at trial. *Id.* at 582.

<sup>91</sup> *Id.* at 583.

Thus, in the context of the two cases discussed above, several courts have considered and disagreed over the various issues that arise under the reporter-source confidentiality agreement problem. These issues are considered more fully in the next two sections.

## II. CONTRACT LAW AND THE REPORTER-SOURCE CONFIDENTIALITY AGREEMENT

Contract law requires that the three basic elements of offer, acceptance and consideration be present in order to create a binding agreement.<sup>92</sup> Courts construing reporter-source confidentiality agreements have found that all three elements exist.<sup>93</sup> The source's proposal to provide information, conditioned upon confidentiality, is an offer.<sup>94</sup> The reporter's consent to the condition constitutes an acceptance.<sup>95</sup> The consideration going to the source is the promise of confidentiality, while the consideration going to the reporter is the promise of information.<sup>96</sup> The publication of the source's name or other information required under the contract to be kept confidential constitutes a breach of that agreement.<sup>97</sup> Although the elements of a valid contract exist, the agreement may still be held unenforceable under other contract doctrines, such as vagueness or lack of intent to contract.

### A. *The Vague and Ambiguous Nature of the Agreement*

Although one can generally find all the elements of a contract in reporter-source confidentiality agreements, the vague and ambiguous nature of some such agreements has led one court to decide not to enforce a reporter-source agreement.<sup>98</sup> In *Ruzicka v. Conde Nast Publications, Inc.*, the United States District Court for the District of Minnesota held that the lack of clear and unambiguous terms in the agreement prevented the court from enforcing it.<sup>99</sup>

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<sup>92</sup> See J. MURRAY, MURRAY ON CONTRACTS §§ 17, 18, 72 (2d rev. ed. 1974).

<sup>93</sup> See, e.g., *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 202 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*"). The court conceded that "[a] contract, it is said, consists of an offer, an acceptance, and consideration. Here, we seemingly have all three, plus a breach . . ." *Id.*

<sup>94</sup> Dicke, *supra* note 3, at 1567 n.77.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Cohen II*, 457 N.W.2d at 202.

<sup>98</sup> *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1300-01 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991).

<sup>99</sup> *Id.*

The case involved a suit by a sexual assault victim against *Glamour* magazine, which had interviewed her on the condition that she would not be "identified or identifiable."<sup>100</sup> In considering her breach of contract claim, the court emphasized that it could not enforce such an ambiguous agreement because of the uncertainty that such agreements would cause among reporters and editors attempting to comply with their terms.<sup>101</sup> Such enforcement, reasoned the court, would chill the exercise of a free press because news organizations would have to operate under the shadow of litigation, uncertain what would constitute a breach of the agreement.<sup>102</sup>

The Minnesota Supreme Court in *Cohen v. Cowles Media Co.*, however, indicated that vagueness and ambiguity alone do not constitute reasons for courts to vacate the area entirely.<sup>103</sup> The court reasoned that such difficulties constitute problems of proof only and do not justify a per se ban on the enforcement of reporter-source confidentiality agreements.<sup>104</sup> Moreover, the court reasoned that the facts of *Cohen* did not present such a difficulty because the reporters had made a clear promise not to publish Cohen's name.<sup>105</sup> Thus, the *Cohen* court concluded that the indefiniteness that often characterizes such agreements cannot serve to invalidate particular agreements that are themselves clear and definite.<sup>106</sup>

### B. Intentions of the Parties

In addition to the question of vagueness, the legal significance that the parties intend to attach to reporter-source confidentiality agreements is also an issue for courts considering whether or not to enforce the agreements.<sup>107</sup> In *Cohen II*, the Minnesota Supreme Court, although it held that all the elements of a valid contract were

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<sup>100</sup> *Id.* at 1291.

<sup>101</sup> *Id.* at 1300.

<sup>102</sup> *Id.*

<sup>103</sup> *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 203 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* See *supra* note 24 and accompanying text for a discussion of the terms of the agreement in *Cohen*.

<sup>106</sup> *Cohen II*, 457 N.W.2d at 203. The *Cohen II* court, however, refused to enforce the agreement on other grounds, reasoning that the parties did not intend to enter a legally binding agreement. *Id.* See *infra* notes 107-11 and accompanying text for a discussion of the court's reasoning as to the parties' intentions.

<sup>107</sup> *Cohen II*, 457 N.W.2d at 203. The court stated that "[t]he law . . . does not create a contract where the parties intended none." *Id.*

present, and that the terms were clear, nevertheless concluded that the parties to the agreement did not intend their actions to be legally enforceable.<sup>108</sup> Rather, the court reasoned, the parties understood their obligation to be a moral one that, on its own, could not support a contract.<sup>109</sup> The court termed the reporter-source exchange a "special ethical" relationship that should not be subject to the rigidity of contract law.<sup>110</sup> The court, therefore, concluded that each party to a reporter-source agreement must assume risks and can be protected only by each other's good faith, not by contract law.<sup>111</sup>

Though no court has yet applied the objective theory of contracts to the enforcement of reporter-source agreements, the theory would provide an alternative ground for analysis.<sup>112</sup> The objective theory recognizes that, generally, there is no requirement that a party to a contract must intend, or even that he or she must know of, the legal consequences of his or her actions in entering a contract.<sup>113</sup> As long as the person's outward actions indicate an intent to enter a binding agreement, a court will enforce the contract.<sup>114</sup> A court will enforce a party's subjective intentions only if the other party knows or should know of the first party's subjective intent.<sup>115</sup> Thus, in deciding whether the parties to reporter-source agreements can be legally bound, both the objective theory of contracts, as well as the moral obligation reasoning set forth in *Cohen II*, are relevant.

### C. Promissory Estoppel

Another theory under which courts might analyze the enforceability of reporter-source agreements is that of promissory estop-

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<sup>108</sup> *Id.* The court reasoned that "[w]e are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract." *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* It should be noted that the Eighth Circuit, in *Ruzicka*, followed the reasoning of the *Cohen II* court in holding that the reporter-source agreement could not be enforced under a pure contract theory. *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578, 582 (8th Cir. 1991).

<sup>112</sup> E. FARNSWORTH, *CONTRACTS* § 3.6 (1st ed. 1982).

<sup>113</sup> *Id.* § 3.7.

<sup>114</sup> *Id.* § 3.6.

<sup>115</sup> *Id.* § 3.7. Knowledge of the first party's subjective intent not to be bound can be constructive. Courts can find such knowledge in the words that the first party uses or in the circumstances surrounding the agreement (most often associated with instances where it is obvious that the person is making the promise for amusement purposes and, thus, obviously has no intent to be bound). *Id.*

pel.<sup>116</sup> Courts established the doctrine of promissory estoppel to soften the harsh results of strict contract law in cases where some requisite contractual element was missing, but where the promisee had relied, to his or her detriment, on the promise.<sup>117</sup> Under section 90 of the *Restatement (Second) of Contracts*, the promisee, or a third party, must have relied upon the promise, and the promisor must have reasonably expected such reliance by the promisee or third party.<sup>118</sup> Finally, if the court also finds that injustice can be avoided only by enforcement of the promise, it may enforce the promise under the promissory estoppel doctrine.<sup>119</sup> In the case of reporter-source confidentiality agreements, where a source, in good faith, relies upon the promise of a reporter that he or she will not reveal the source of the information, a court could enforce such a promise under the doctrine of promissory estoppel.<sup>120</sup>

In *Cohen II*, the Minnesota Supreme Court decided not to apply the promissory estoppel doctrine to enforce the contract.<sup>121</sup> The court reasoned that, unlike contract theory, where a court neutrally applies the terms of the agreement without regard for the substance of the agreement, the decision to enforce an agreement under a promissory estoppel theory must necessarily take into account the circumstances and substance of the promise, as well as the circumstances surrounding the breach.<sup>122</sup> The court reasoned that this taking into account of the actual circumstances and substance of the promise was necessary given the injustice requirement of *Restatement* section 90, because such a requirement necessarily requires courts to look into the agreement and its effects rather than simply to enforce its terms neutrally.<sup>123</sup>

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<sup>116</sup> See, e.g., *Cohen v. Cowles Media Co.* ("*Cohen III*"), 111 S. Ct. 2513, 2517-20 (1991); *Cohen II*, 457 N.W.2d at 203-05; see also *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (1981). In relevant part, section 90 states:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

*RESTATEMENT (SECOND) OF CONTRACTS* § 90 (1981).

<sup>117</sup> See *FARNSWORTH*, *supra* note 112, § 2.19.

<sup>118</sup> *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (1981).

<sup>119</sup> *Id.*

<sup>120</sup> *Cohen II*, 457 N.W.2d at 205.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 204-05.

<sup>123</sup> *Id.*



Under this reasoning, the court concluded that, given the "dirty tricks" of both parties to the Cohen agreement, and, because the protection of Cohen's deniability in this case was not so important under the injustice requirement of *Restatement* section 90, it could not enforce the contract under a promissory estoppel theory.<sup>124</sup> Faced, in other words, with facts indicating unclean hands and trickery on both sides (Cohen's connection to the Whitney campaign and his desire to smear Johnson; the newspapers' decision to breach their agreements), the court concluded that no injustice would result from its failure to enforce the contract.<sup>125</sup>

Finally, the court stated that because it would be forced to look into the substance of the agreement in this way, a decision to enforce under promissory estoppel would require the court to abandon neutral principles and engage in active intervention implicating the First Amendment.<sup>126</sup> Analyzing the issue, therefore, under the requirements of the First Amendment, the *Cohen II* court pointed out that the case arose in a classic First Amendment context: namely, a political debate.<sup>127</sup> The court stated that in some circumstances, a promissory estoppel remedy may be available to a confidential source where the state's interest in enforcing the promise outweighs the First Amendment interests.<sup>128</sup> The court concluded, however, that in the circumstances of this case, the law should not provide a remedy and the parties should be left simply to their trust in one another.<sup>129</sup> Thus, the court chose not to enforce the agreement under a promissory estoppel theory.<sup>130</sup>

In *Cohen III*, however, the United States Supreme Court held that the First Amendment would not bar a promissory estoppel remedy in the reporter-source agreement context.<sup>131</sup> The Court did agree with the Minnesota high court that state action was present because a promissory estoppel theory, in the absence of a normal contract, involves the active imposition, by the court, of obligations never explicitly assumed by the parties.<sup>132</sup> Thus, like the Minnesota

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See id.*

<sup>127</sup> *Id.* at 205.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Cohen v. Cowles Media Co.* ("*Cohen III*"), 111 S. Ct. 2513, 2518-19 (1991).

<sup>132</sup> *Id.* at 2518.

Supreme Court, the United States Supreme Court found it necessary to consider the effect of the First Amendment.<sup>133</sup> The Court held, however, that the First Amendment would not be violated by the application of a generally applicable rule of law (promissory estoppel) to the press.<sup>134</sup> Though it could not, of course, decide whether the state law promissory estoppel remedy should actually be applied to the case, the Court did hold, contrary to the state high court, that the First Amendment would not bar such a remedy.<sup>135</sup>

The question of whether promissory estoppel can be applied in the context of a reporter-source confidentiality agreement, then, has only been fully considered by two courts.<sup>136</sup> Both agreed that a court's application of the doctrine would involve active intervention sufficient to constitute state action implicating the First Amendment.<sup>137</sup> The two courts, however, disagreed as to whether the First Amendment would bar a promissory estoppel remedy.<sup>138</sup> On this matter, of course, the United States Supreme Court has the last word.

If a court determines that analysis of these contract law issues demonstrates the existence of a valid, legally enforceable contract (or, in the case of promissory estoppel, that the *Restatement* requirements are present), the analysis is not complete. The court must also consider whether the First Amendment applies and, if so,

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2518-19.

<sup>136</sup> *Id.* at 2517-20; *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 203-05 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*"). It should be noted that the Court of Appeals for the Eighth Circuit, in *Ruzicka*, did state that promissory estoppel may be available in the reporter-source agreement context. *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578, 582 (8th Cir. 1991). That court, however, did not discuss the merits of applying the promissory estoppel theory in the reporter-source context because it was bound by the Supreme Court's holding in *Cohen III*. *See id.* at 582-83. Nor did the court reach the particular applicability of the promissory estoppel theory to the case before it; rather, the court simply remanded the issue to the district court for further consideration. *Id.* at 583. In addition, the Supreme Court for Monroe County, New York, in *Anderson v. Strong Memorial Hospital*, relied on the *Cohen III* decision as well in holding that an action to enforce a promise, made by a reporter and a photographer, was not barred by the First Amendment. 573 N.Y.S.2d 828, 830 (N.Y. Sup. Ct. 1991). That court, however, did not distinguish a pure contract theory from a promissory estoppel theory and held simply that *Cohen III* dictates that a breach of promise action in the reporter-source context is not barred by the First Amendment. *Id.*

<sup>137</sup> *Cohen III*, 111 S. Ct. at 2518; *Cohen II*, 457 N.W.2d at 204-05.

<sup>138</sup> *Cohen III*, 111 S. Ct. at 2518-19; *Cohen II*, 457 N.W.2d at 204-05.

whether the First Amendment requires special protection for the media defendant.<sup>139</sup>

### III. THE FIRST AMENDMENT AND THE REPORTER-SOURCE CONFIDENTIALITY AGREEMENT

Courts construing reporter-source confidentiality agreements must undertake a three-part analysis in deciding whether the First Amendment provides the media any constitutional protection when they are being sued by sources for breach of contract.<sup>140</sup> The first requirement is the presence of state action, because the Bill of Rights only protects citizens against governmental action.<sup>141</sup> If state action exists, the court will then need to determine whether the reporter waived his or her First Amendment rights by entering into the reporter-source contract.<sup>142</sup> Finally, if the reporter did not make such a waiver, the court must balance the need to enforce the agreement against the burden on the First Amendment that such enforcement would cause.<sup>143</sup>

#### A. State Action

The First Amendment to the United States Constitution prohibits Congress from making any laws burdening free speech or free press.<sup>144</sup> The Constitution limits application of this prohibition to governmental action that in some way restricts speech or the press, excluding private action that has the same effect.<sup>145</sup> Thus, if the First Amendment is to play any role in an analysis of reporter-source confidentiality agreements, courts must find some sort of governmental action restricting speech or the press.<sup>146</sup>

The United States Supreme Court first held that a court's enforcement of a private agreement may constitute state action in the

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<sup>139</sup> See, e.g., *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1295 (D. Minn. 1990), modified, 939 F.2d 578, 584 (8th Cir. 1991).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> U.S. CONST. amend. I. The First Amendment states, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

<sup>145</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 254 (Minn. Ct. App. 1989) (citing *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952)), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>146</sup> *Ruzicka*, 733 F. Supp. at 1295.

1948 case, *Shelley v. Kraemer*.<sup>147</sup> The petitioners in *Shelley*, a black family, had received title to a parcel of land in St. Louis, Missouri.<sup>148</sup> A group of neighbors subsequently brought suit to enforce certain restrictive covenants on the land that, by their terms, prohibited the sale of real property to non-Caucasian persons.<sup>149</sup> The petitioners urged, however, that court enforcement of the restrictive covenants would violate their Fourteenth Amendment rights.<sup>150</sup> Though the agreements were private in nature and would not violate the Constitution if they were voluntarily enforced, the Court reasoned that any action by a court to enforce the covenants would constitute state action in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>151</sup> The Court stated that, were it not for the intervention of the state courts in enforcing the covenants, the black petitioners would have been free to occupy the properties.<sup>152</sup> Thus, at least in the case of racially restrictive covenants sought to be enforced against third parties, the Supreme Court has held that judicial action can amount to state action.<sup>153</sup>

In the 1964 case, *New York Times Co. v. Sullivan*, the United States Supreme Court considered the state action issue in the context of the First Amendment.<sup>154</sup> In *New York Times*, which involved a defamation action brought by the Montgomery, Alabama Commissioner of Public Affairs, the Court held that the application of a state rule of law by a court is state action implicating the First Amendment.<sup>155</sup> The Commissioner brought suit against the *Times*, claiming that an advertisement which appeared in the defendant newspaper libeled him.<sup>156</sup> The Court summarily decided the issue of state action by stating that any application, by a court, of a state rule of law that in some way imposes invalid restrictions on constitutional speech and press freedoms is state action.<sup>157</sup>

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<sup>147</sup> 334 U.S. 1, 20 (1948).

<sup>148</sup> *Id.* at 5.

<sup>149</sup> *Id.* at 4-6.

<sup>150</sup> *Id.* at 7.

<sup>151</sup> *Id.* at 20. The Court stated, "[w]e hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." *Id.*

<sup>152</sup> *Id.* at 19.

<sup>153</sup> *See id.* at 20.

<sup>154</sup> 376 U.S. 254, 265 (1964).

<sup>155</sup> *See id.* at 265. The Court dismissed the plaintiff's claim that state action was not involved: "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Id.*

<sup>156</sup> *Id.* at 256.

<sup>157</sup> *See id.* at 265.

In addition to its finding of state action, the Supreme Court, addressing the standard required in defamation cases, concluded that in order to adequately safeguard First Amendment rights, public officials who bring defamation suits must show that the defendant acted with "actual malice."<sup>158</sup> The Court reasoned that the likely chilling effect upon criticism of official conduct caused by the specter of potential defamation suits would create an impermissible First Amendment burden.<sup>159</sup> Thus, the Court, in the context of defamation law, extended special protection to speech regarding public officials by requiring, in addition to a requirement of falsity, proof that the defendant acted with some sort of knowledge or recklessness as to the statements' truth.<sup>160</sup>

In contrast, the United States Supreme Court has held, in various situations, that a court's application of neutral and nondiscriminatory common law does not amount to state action.<sup>161</sup> For example, in the 1978 United States Supreme Court case, *Flagg Bros. v. Brooks*, the Court held that action by a private party pursuant to state law was not state action.<sup>162</sup> In *Flagg Bros.*, New York state law simply allowed, but did not compel, a creditor to take private action against the debtor's belongings.<sup>163</sup> The case involved a suit brought by a debtor who claimed that the creditor's threatened sale of her belongings violated 42 U.S.C. § 1983, and that the state law involved violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>164</sup> The Court held that the State of New York could not be held responsible for its mere acquiescence in the private decision of the creditor to threaten sale of the debtor's property and that the action, therefore, did not implicate the Fourteenth Amendment.<sup>165</sup>

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<sup>158</sup> *Id.* at 279-80. The Court's standard of "actual malice" involves something beyond mere falsity of the defamatory material and requires proof of knowledge of the falsity or reckless disregard for the truth or falsity. *Id.*

<sup>159</sup> *Id.* at 279.

<sup>160</sup> *Id.* at 279-80.

<sup>161</sup> See *Tulsa Professional Collection Servs. Inc., v. Pope*, 485 U.S. 478, 485 (1988); *Flagg Bros. v. Brooks*, 436 U.S. 149, 157-63 (1978); *Evans v. Abney*, 396 U.S. 435, 446 (1970).

<sup>162</sup> 436 U.S. 149, 157-63 (1978).

<sup>163</sup> *Id.* at 165. The New York law involved was the New York Uniform Commercial Code section 7-210 which allowed warehousemen to sell the debtor's property. *Id.* at 151.

<sup>164</sup> *Id.* at 153. The Court stated that 42 U.S.C. § 1983 requires action "'under color of any statute' of the [s]tate." *Id.* at 155. This provision is not at issue in the reporter-source context, and the reasoning discussed here is, therefore, limited to the court's treatment of the state action issue.

<sup>165</sup> *Id.* at 165. The Court reasoned that "[t]his court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Id.* at 164.

Similarly, in the 1970 case, *Evans v. Abney*, the United States Supreme Court held that a state court's application of neutral and nondiscriminatory state trust laws does not violate the Fourteenth Amendment.<sup>166</sup> In *Evans*, a former United States senator conveyed a tract of land in trust to the city of Macon, Georgia, for the creation of a park for the exclusive use of white people.<sup>167</sup> Because an earlier decision of the Court in *Evans v. Newton* had held that the park could not continue to be operated in a racially discriminatory way,<sup>168</sup> the Georgia Supreme Court held that the trust terms could not be fulfilled and that the property, therefore, reverted to the heirs of the senator.<sup>169</sup> The United States Supreme Court decided that, because this action was a neutral application of trust law, in that it deprived both whites and non-whites of the use of the property, it did not violate the Constitution.<sup>170</sup>

In *Cohen v. Cowles Media Co. (Cohen I)*, the suit to enforce the private confidentiality agreement presented the state action issue to the Minnesota Court of Appeals.<sup>171</sup> That court stated that the *Flagg Bros.* and *Evans* decisions stood for the proposition that the neutral application of state laws does not amount to state action.<sup>172</sup> Citing *Shelley v. Kraemer*, however, the court also acknowledged that court action can be state action where the court is engaged in "active intervention."<sup>173</sup>

In deciding between the two conflicting rationales, the Minnesota Court of Appeals reasoned that the enforcement of the reporter-source agreement was not active intervention similar to that in *Shelley*, but rather, it was the application of neutral contract law.<sup>174</sup> The *Cohen I* court reasoned that the court's enforcement of the agreement would simply involve the neutral enforcement of a prior agreement at the request of one of the parties to the agreement.<sup>175</sup> Conversely, according to the court, *Shelley* involved positive action

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<sup>166</sup> 396 U.S. 435, 446 (1970).

<sup>167</sup> *Id.* at 436.

<sup>168</sup> 382 U.S. 296, 302 (1966).

<sup>169</sup> See *Evans*, 396 U.S. at 436. The Georgia Supreme Court decision is reported at 165 S.E.2d 160, 166 (Ga. 1968).

<sup>170</sup> *Evans*, 396 U.S. at 446.

<sup>171</sup> *Cohen v. Cowles Media Co. ("Cohen I")*, 445 N.W.2d 248, 254 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>172</sup> *Id.* at 254-55.

<sup>173</sup> *Id.* at 255.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

by the courts at the request of third parties against persons who were not party to the agreement.<sup>176</sup> The court, therefore, decided that the *Flagg Bros./Evans* neutral application rationale most closely resembled the reporter-source problem and that the enforcement of the agreement did not constitute state action.<sup>177</sup>

Further, the Minnesota appeals court acknowledged the *New York Times Co. v. Sullivan* holding that the application of state defamation law to a newspaper constitutes state action.<sup>178</sup> In distinguishing *New York Times* from reporter-source agreement cases, the appeals court noted that important differences exist between defamation and contract law.<sup>179</sup> The *Cohen I* court reasoned that the rules of contract are neutral as to speech because they do not require the suppression of any particular words.<sup>180</sup> Rather, the rules of contract would be applied in this context to suppress those words that the parties have already agreed to keep confidential.<sup>181</sup> Thus, reasoned the court, contract law is directed not at the words themselves, but at one party's failure to honor his or her promise.<sup>182</sup> The *Cohen I* court concluded, therefore, that because contract law, unlike defamation law, is neutral as to speech, the application of contract law to the reporter-source problem is not state action.<sup>183</sup>

The Minnesota Supreme Court rejected the appeals court's analysis and held that the court's action was state action.<sup>184</sup> Initially, the state supreme court acknowledged the appeals court's application of the "neutral principles" analysis to cases involving enforcement under a contract theory.<sup>185</sup> The state supreme court, however, declined to enforce the agreement under traditional contract law because it concluded that the parties had not intended to attach legal significance to the agreement.<sup>186</sup> The *Cohen II* court then explored the possibility of enforcement under a promissory estoppel

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 255-56.

<sup>179</sup> *Id.* at 256.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 204-05 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>185</sup> *Id.* at 204.

<sup>186</sup> *Id.* at 203. See *supra* notes 107-11 and accompanying text for a discussion of the court's reasoning as to the parties' intentions.

theory.<sup>187</sup> The court concluded that the "neutral principles" analysis was not applicable in a promissory estoppel context because of the injustice requirement of the *Restatement's* promissory estoppel provision.<sup>188</sup> In other words, because the court, under a promissory estoppel analysis, must consider the substantive circumstances and facts surrounding the agreement and its breach, it could no longer apply neutral principles of contract law.<sup>189</sup> The court, therefore, concluded that the proposed enforcement, by the court, of the confidentiality agreement rose beyond the level of neutral application to the level of state action.<sup>190</sup>

The United States Supreme Court, in *Cohen III*, agreed that the application, by a court, of a promissory estoppel remedy involved active intervention sufficient to constitute state action.<sup>191</sup> The Court's reasoning, somewhat different from that of the *Cohen II* court, noted that promissory estoppel involves the imposition, by the court, of legal obligations that were never explicitly assumed by the parties to the agreement.<sup>192</sup> Like the *Cohen II* court, however, the United States Supreme Court in *Cohen III* concluded that such active application, by a court, of the state law doctrine of promissory estoppel would constitute state action implicating the First Amendment.<sup>193</sup> It should be noted, however, that the Court considered only the promissory estoppel remedy and did not address whether enforcement of the agreement under normal contract law would constitute state action.<sup>194</sup>

In its consideration of the state action question, the federal district court in *Ruzicka v. Conde Nast Publications, Inc.* did not mention the neutral principles analysis.<sup>195</sup> Rather, the court concluded that no meaningful difference existed between the defamation action in *New York Times* and the reporter-source contract action.<sup>196</sup> The court reasoned that any differences that exist between tort and

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<sup>187</sup> *Cohen II*, 457 N.W.2d at 203. See *supra* notes 121-30 and accompanying text for a discussion of the court's reasoning as to promissory estoppel.

<sup>188</sup> *Cohen II*, 457 N.W.2d at 205.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Cohen v. Cowles Media Co.* ("*Cohen III*"), 111 S. Ct. 2513, 2518 (1991).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> See *id.* at 2516.

<sup>195</sup> 733 F. Supp. 1289, 1295-96 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991).

<sup>196</sup> *Id.* at 1295.



contract law are not significant enough to justify variant treatment.<sup>197</sup> The district court in *Ruzicka* thus concluded that state action existed in the court's enforcement of the promise.<sup>198</sup>

In sum, in the context of the reporter-source confidentiality agreement, courts have taken three distinct positions on the state action issue. The *Ruzicka* court found the *New York Times* rationale most convincing and concluded that no important differences exist between tort and contract law for state action purposes.<sup>199</sup> The *Cohen II* and *Cohen III* courts, considering enforcement under a promissory estoppel theory, concluded that no neutral application of law could arise under promissory estoppel and that there was, therefore, state action.<sup>200</sup> Finally, the *Cohen I* court reasoned that the neutral principles logic of *Evans* and *Flagg Bros.* was most applicable in this context and concluded that there was no state action.<sup>201</sup>

### B. Waiver

If state action is present in the enforcement of a reporter-source confidentiality agreement, the First Amendment may still not apply if the reporter, by entering the agreement, has waived his or her constitutional rights.<sup>202</sup> In addressing the standard for waiver of First Amendment rights, the United States Supreme Court has held that in order to be effective, such a waiver must be "clear and compelling."<sup>203</sup>

With regard to contractual waiver of First Amendment rights, the United States Court of Appeals for the Third Circuit held, in the 1988 case of *Erie Telecommunications, Inc. v. City of Erie*, that constitutional rights may be contractually waived under certain cir-

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<sup>197</sup> *Id.* One commentator has agreed with this analysis, stating summarily that "state action occurs through judicial enforcement of the rights of the parties." Dicke, *supra* note 3, at 1574 n.118.

<sup>198</sup> *Ruzicka*, 733 F. Supp. at 1296.

<sup>199</sup> *Id.* at 1295.

<sup>200</sup> *Cohen v. Cowles Media Co.* ("*Cohen III*"), 111 S. Ct. 2513, 2518 (1991); *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 205 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991).

<sup>201</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 255-57 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>202</sup> *Ruzicka*, 733 F. Supp. at 1296-98.

<sup>203</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (defamation defendant's failure to raise a constitutional defense before trial did not constitute a waiver of that defense in circumstances that fell short of being clear and compelling).

cumstances.<sup>204</sup> *Erie Telecommunications* involved a cable operator which claimed that its agreements with the city of Erie, Pennsylvania violated its First Amendment rights.<sup>205</sup> The operator asserted that the agreements imposed a money and content-based prior restraint upon the cable operator and that they singled out the operator in a discriminatory manner.<sup>206</sup>

The Court of Appeals in *Erie Telecommunications* discussed the United States Supreme Court's standard for contractual waiver of constitutional rights.<sup>207</sup> The *Erie Telecommunications* court concluded that, applying the Supreme Court standard for waiver to the cable operator's situation, a contractual waiver of rights is effective only where the waiving party clearly acts voluntarily and with a full understanding of the consequences of the waiver.<sup>208</sup> The *Erie Telecommunications* court noted that under the United States Supreme Court cases, such volition and understanding exist where the parties have equal bargaining power, where the terms of the contract are freely negotiated, where the waiving party has the advice of counsel, and where the waiving party has engaged in other contract negotiations in the past.<sup>209</sup> The court considered each of these factors important in holding that the cable operator had executed a valid waiver of its constitutional rights.<sup>210</sup>

In *Cohen v. Cowles Media Co. (Cohen I)*, the Court of Appeals of Minnesota, after reviewing the *Erie Telecommunications* standard, reaffirmed and approved the standard concluding that the reporters had, in fact, waived their First Amendment rights upon entering the contract with Cohen.<sup>211</sup> The court specifically noted that both reporters were veterans who had entered many such agreements in the past.<sup>212</sup> Further, the court noted that both reporters knew of Cohen's status as a public figure and therefore knew that they were

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<sup>204</sup> 853 F.2d 1084, 1094 (3d Cir. 1988).

<sup>205</sup> *Id.* at 1085.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1094-96. In its discussion of the United States Supreme Court's waiver standard, the *Erie Telecommunications* court focused on two 1972 cases, *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972). *Erie Telecommunications*, 853 F.2d at 1095-96.

<sup>208</sup> *Erie Telecommunications*, 853 F.2d at 1096.

<sup>209</sup> *Id.*

<sup>210</sup> *See id.* at 1096-97.

<sup>211</sup> *Cohen v. Cowles Media Co. ("Cohen I")*, 445 N.W.2d 248, 258 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>212</sup> *Id.*

waiving the right to publish a name of public interest.<sup>213</sup> Finally, the court considered it significant that the waiver was not extracted by the state as in the case of a criminal defendant pleading guilty to a crime or waiving his or her right to a jury trial.<sup>214</sup> Rather, the court reasoned, both parties to these agreements were experienced and on an equal footing, and the reporters, therefore, need not have been afforded as much protection as a criminal defendant.<sup>215</sup>

The United States District Court for the District of Minnesota, in *Ruzicka v. Conde Nast Publications, Inc.*, decided that the magazine had not waived its constitutional rights.<sup>216</sup> Because the facts in *Ruzicka* did not present the kind of clear contractual terms that *Cohen* presented, the court held that the waiver did not meet the *Erie Telecommunications* standard.<sup>217</sup> Specifically, the court reasoned that the waiver was not voluntary and knowing because the terms of the agreement, requiring that the plaintiff not be identified or made identifiable, were not sufficiently specific to apprise the reporter of what information could not be published.<sup>218</sup> Thus, to constitute a valid contractual waiver, a reporter-source confidentiality agreement must be clear about what may permissibly be published in order to ensure that the reporter has full knowledge of the consequences of the waiver.<sup>219</sup>

In sum, in order to make a valid waiver of First Amendment rights in the reporter-source agreement context, the reporter must be waiving his or her rights voluntarily and with a clear understanding of the consequences of the waiver.<sup>220</sup> Moreover, in attempting to determine whether a reporter has made such a voluntary and knowing waiver, a court will look to the circumstances of the waiver, including the parties' sophistication, relative bargaining strength and access to legal counsel.<sup>221</sup>

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> 733 F. Supp. 1289, 1298 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991).

<sup>217</sup> *Id.* at 1296-98.

<sup>218</sup> *Id.* at 1298. The court reasoned that a "reporter, for the most part, cannot know what information will threaten the anonymity of a source, unless the source specifies what facts should not be published." *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 1297.

<sup>221</sup> *Id.*

*C. First Amendment Rights Balanced Against the Interests in  
Enforcement of the Contract*

If a court cannot find a valid waiver in the terms of the agreement, the First Amendment does not require automatic voidance of a contract that is found to burden speech or the press.<sup>222</sup> The United States Supreme Court has established a balancing test to determine whether the state action involved impermissibly burdens the First Amendment.<sup>223</sup> Specifically, the Court has stated, in the 1983 case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, that it will not uphold a burden upon the First Amendment unless its proponents can show an overriding governmental interest in support of the state action.<sup>224</sup> The *Minneapolis Star* case involved the state's enactment of a special use tax upon the cost of paper and ink products consumed in the production of newspapers.<sup>225</sup> The Supreme Court, noting that a tax that singles out the press places a heavy burden on the state to show adequate justification for its actions, concluded that Minnesota had shown no such justification.<sup>226</sup> Though the First Amendment interests outweighed the state interests in *Minneapolis Star*, the Court, nonetheless, recognized that First Amendment rights are not absolute and may be burdened to some extent where the state can show an overriding governmental interest.<sup>227</sup>

Similarly, in terms of the reporter-source agreement problem, the district court in *Ruzicka* stated that it is necessary to examine the interests protected by the First Amendment and weigh them against the need to enforce the agreement.<sup>228</sup> For this reason, the

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<sup>222</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 256 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>223</sup> *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972); *see also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983).

<sup>224</sup> *Minneapolis Star*, 460 U.S. at 582.

<sup>225</sup> *Id.* at 577.

<sup>226</sup> *Id.* at 592-93.

<sup>227</sup> *See id.* at 582, 585. The Court stated that "[d]ifferential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585.

<sup>228</sup> *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1298 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991). The district court in *Ruzicka* stated that "[r]esolution of this question requires a balancing of the interests underlying the state law of contracts and the interests protected by the free speech and press clauses of the [F]irst [A]mendment." *Id.*

*Ruzicka* court attempted a balancing test like that which the United States Supreme Court has employed in other contexts.<sup>229</sup>

### 1. The Need to Enforce the Agreement

The Minnesota appeals court in *Cohen I* discussed cases in which courts have considered contractual rights to be generally compelling, and even sufficient to outweigh First Amendment considerations.<sup>230</sup> For example, in the 1980 United States Supreme Court case, *Snepp v. United States*, the Central Intelligence Agency ("CIA") sued a former agent who had published a book about his experiences without obtaining the Agency's specific prior approval.<sup>231</sup> Such approval was required under Snepp's employment agreement with the CIA.<sup>232</sup> The Court held that the agent had breached the agreement, and the Court imposed a constructive trust, benefiting the government, on all of the book's profits attributable to the breach.<sup>233</sup> In so holding, the Court reversed the Fourth Circuit Court of Appeals' opinion which had held that Snepp had a First Amendment right to publish unclassified information.<sup>234</sup> The United States Supreme Court rejected the First Amendment argument and held that the terms of the agreement explicitly prohibited publication of *any* information related to the agent's experience with the CIA, absent pre-publication review and clearance.<sup>235</sup> Thus, the Court implicitly held that the contractual obligation took priority over First Amendment considerations.<sup>236</sup>

In cases involving reporter-source confidentiality agreements, claimants have offered various rationales demonstrating the importance of enforcing such agreements.<sup>237</sup> Plaintiffs have argued that

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<sup>229</sup> *Id.* at 1298-1301.

<sup>230</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 257 (Minn. Ct. App. 1989) (citing *Snepp v. United States*, 444 U.S. 507, 511 (1980); *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377, 381-83 (Minn. 1979)), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>231</sup> 444 U.S. at 507-08.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 515-16.

<sup>234</sup> *Id.* at 509-10.

<sup>235</sup> *Id.* at 508-13.

<sup>236</sup> *See id.* at 510-13.

<sup>237</sup> *See, e.g., Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1299 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991); *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 205-07 (Minn. 1990) (Yetka, J., dissenting), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*"); *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 256-58 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

news sources, if unable to enforce such agreements, would be reluctant to give information, thereby depriving the public of important news.<sup>238</sup> In addition, such a breach can cause serious harm to the source's reputation, livelihood and even personal safety.<sup>239</sup> In addition, one commentator has noted that such breaches by reporters are occurring more frequently, creating an increasingly problematic situation for news sources.<sup>240</sup>

Finally, one commentator has pointed out that non-enforcement of these agreements would seriously weaken the rationale for extending to reporters any type of privilege that would protect them from being *compelled* to disclose their sources.<sup>241</sup> The dissent in *Cohen II* reasoned that it is inconsistent to shield the press from compulsory disclosure in some cases and to allow disclosure with impunity in others.<sup>242</sup> The United States Supreme Court has held that the First Amendment does not exempt reporters from compulsory disclosure in the context of a grand jury investigation.<sup>243</sup> Many courts, however, have upheld a conditional privilege for reporters in certain cases.<sup>244</sup> Further, many states have enacted so-called "shield laws" that, in varying degrees, extend protection to reporter-source confidentiality.<sup>245</sup> Thus, the dissent in *Cohen II* concluded that it would be inconsistent to allow reporters to invoke the reporter-source privilege where they do not wish to reveal a source and to allow them to disregard the reporter-source confidentiality agreement where it is in their interest to reveal the source.<sup>246</sup>

Thus, several important interests exist in enforcing reporter-source confidentiality agreements.<sup>247</sup> Indeed, the governmental in-

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<sup>238</sup> See *Cohen II*, 457 N.W.2d at 206 (Yetka, J., dissenting); *Cohen I*, 445 N.W.2d at 257. *Contra Ruzicka*, 733 F. Supp. at 1299.

<sup>239</sup> *Ruzicka*, 733 F. Supp. at 1299.

<sup>240</sup> Monica Langley & Lee Levine, *Broken Promises*, 27 COLUM. JOURNALISM REV. 21, 21-22 (July-Aug. 1988).

<sup>241</sup> *Id.* at 24.

<sup>242</sup> *Cohen II*, 457 N.W.2d at 206 (Yetka, J., dissenting).

<sup>243</sup> *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972) (Court required that the reporter testify pursuant to a grand jury subpoena, notwithstanding the reporter's First Amendment rights).

<sup>244</sup> See Dicke, *supra* note 3, at 1565-66 (citing *Zelenka v. State*, 266 N.W.2d 279, 287 (Wis. 1978); Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, *Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 850-51 (1983)).

<sup>245</sup> See Dicke, *supra* note 3, at 1566 n.72.

<sup>246</sup> *Cohen II*, 457 N.W.2d at 206 (Yetka, J., dissenting).

<sup>247</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 256-57 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

terest in enforcing contractual rights has been considered, in another context, to outweigh First Amendment considerations.<sup>248</sup> Moreover, in the context of reporter-source agreements, litigants have offered several reasons to enforce such agreements, including protecting sources from injury and avoiding inconsistent logic regarding the sanctity of the reporter-source relationship.<sup>249</sup>

## 2. Burden on the First Amendment

The primary burden on the First Amendment that courts must balance against the interests in enforcement is the possibility that such agreements usurp the editorial process.<sup>250</sup> Both the district court in *Ruzicka* and the dissent in *Cohen I* pointed out that enforcement of the agreement would take decisions as to news content out of the hands of the editor, thus chilling the exercise of a free press.<sup>251</sup> The *Ruzicka* court likened this chilling effect to that feared in *New York Times Co. v. Sullivan*, a defamation case.<sup>252</sup> The *Ruzicka* court explained that in both the reporter-source agreement and defamation contexts, a burden on the editorial process can result from a news organization's reluctance to risk protracted litigation and large damage awards.<sup>253</sup>

In addition, the district court in *Ruzicka* also concluded that because reporter-source agreements are often vague and ambiguous, they create an undue burden on the First Amendment.<sup>254</sup> This ambiguity causes the news organization to be uncertain as to what it may permissibly include in a story.<sup>255</sup> This uncertainty, one commentator has argued, can inhibit the editorial decision-making process by causing editors not to publish.<sup>256</sup> Should the newspaper decide, nonetheless, to print the item of news, court enforcement

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<sup>248</sup> *Snepp v. United States*, 444 U.S. 507, 510-13 (1980).

<sup>249</sup> See *Cohen II*, 457 N.W.2d at 205-06 (Yetka, J., dissenting).

<sup>250</sup> See Dicke, *supra* note 3, at 1569. The article notes that confidentiality agreements "restrain the editorial freedom of media entities to publish what they have learned, by limiting their discretion to disclose either the identity of sources or the information given to reporters on condition it not be published." *Id.*

<sup>251</sup> *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1299-1300 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991); *Cohen I*, 445 N.W.2d at 263 (Crippen, J., concurring in part, dissenting in part).

<sup>252</sup> *Ruzicka*, 733 F. Supp. at 1299-1300; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964); Dicke, *supra* note 3, at 1576.

<sup>253</sup> *Ruzicka*, 733 F. Supp. at 1299-1300.

<sup>254</sup> *Id.* at 1300-01; see also, Dicke, *supra* note 3, at 1570-71.

<sup>255</sup> *Ruzicka*, 733 F. Supp. at 1300.

<sup>256</sup> Dicke, *supra* note 3, at 1570-71.

of the agreement could lead to problems of proof and protracted litigation.<sup>257</sup> Thus, in addition to raising problems of contract law,<sup>258</sup> vagueness can also burden the First Amendment by inhibiting the editorial process.

Finally, Minnesota appeals court Judge Gary Crippen, who wrote the dissent in the *Cohen I* decision, addressed a problem that is at the heart of the First Amendment itself.<sup>259</sup> Judge Crippen argued that First Amendment rights are not solely those of the party seeking to publish or speak.<sup>260</sup> He reasoned that because these rights are those of the public, the newspaper or reporter alone cannot properly waive them.<sup>261</sup> Judge Crippen concluded, therefore, that the appeals court had erred in holding that the reporters had made a valid contractual waiver, because such a waiver would burden the public's First Amendment right to have access to information.<sup>262</sup>

These arguments, then, are the principal ones urging that reporter-source confidentiality agreements burden the First Amendment. The primary objection to such agreements lies in the assertion that they inhibit the free discretion of news organizations and, as such, are inconsistent with the First Amendment.<sup>263</sup> Moreover, newspapers have argued that the informal and vague nature of the reporter-source agreement places an undue burden on the First Amendment.<sup>264</sup> Finally, as Judge Crippen noted, the First Amendment may be impermissibly burdened in this context simply because the public's rights, as guaranteed under the First Amendment, are not properly protected by allowing one person to waive them.<sup>265</sup>

#### IV. THE CASE FOR ENFORCEMENT

The enforcement of reporter-source confidentiality agreements initially appears to involve an unavoidable clash between contract

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<sup>257</sup> *Id.*

<sup>258</sup> See *supra* notes 98–106 and accompanying text for a discussion of the contract law aspects of the vagueness issue.

<sup>259</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 268 (Minn. Ct. App. 1989) (Crippen, J., concurring in part, dissenting in part), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>260</sup> *Id.* at 267–68 (Crippen, J., concurring in part, dissenting in part).

<sup>261</sup> *Id.* at 267 (Crippen, J., concurring in part, dissenting in part).

<sup>262</sup> *Id.* at 267–68 (Crippen, J., concurring in part, dissenting in part).

<sup>263</sup> See Dicke, *supra* note 3, at 1569.

<sup>264</sup> See *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1300 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991).

<sup>265</sup> *Cohen I*, 445 N.W.2d at 267–68 (Crippen, J., concurring in part, dissenting in part).



law and First Amendment protections. Upon closer scrutiny, however, it becomes apparent that courts can compensate injured news sources without damaging the delicate fabric of the First Amendment. Such scrutiny should begin with an inquiry into whether the First Amendment ought to be applied at all in the context of reporter-source confidentiality agreements.

### A. *First Amendment Not Applicable*

The First Amendment should not be applied to prevent enforcement of reporter-source confidentiality agreements. First, because no state action is involved in court enforcement of a privately negotiated agreement, the constitutional limitations do not apply.<sup>266</sup> Second, given a properly structured confidentiality agreement, the reporter involved has effectively waived any First Amendment rights.<sup>267</sup>

The important question for purposes of the state action issue is whether the enforcement of reporter-source agreements like that in *Cohen* should be treated as state action under *Shelley* and *New York Times*, or as the neutral application of state law under *Flagg Bros.* and *Evans*.<sup>268</sup> The *Shelley* factual situation is both unique and easily distinguishable from the circumstances surrounding reporter-source confidentiality agreements.<sup>269</sup> *Shelley* involved court enforcement of racially discriminatory covenants prohibiting the sale of real property to non-Caucasians—particularly offensive agreements that could never be enforced in a socially useful and beneficial manner.<sup>270</sup> Confidentiality agreements, however, serve several useful purposes, including the enhancement of the reporter's ability to gather information that is of interest to the public, and the protection of the source's reputation, livelihood and personal safety.<sup>271</sup> Thus, though some might argue that confidentiality agreements

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<sup>266</sup> See *supra* notes 144–201 and accompanying text for a discussion of state action in the context of the reporter-source confidentiality agreement.

<sup>267</sup> See *supra* notes 202–21 and accompanying text for a discussion of waiver of constitutional rights.

<sup>268</sup> See *supra* notes 147–70 and accompanying text for a discussion of the United States Supreme Court's handling of the state action issue in these cases.

<sup>269</sup> *Shelley v. Kraemer*, 334 U.S. 1, 4–8 (1948). See *supra* notes 147–53 and accompanying text for a discussion of the *Shelley* case.

<sup>270</sup> *Shelley*, 334 U.S. at 4–5.

<sup>271</sup> See *supra* notes 237–46 and accompanying text for a discussion of the various rationales that courts and commentators have offered to demonstrate the usefulness of reporter-source confidentiality agreements.

have some unattractive aspects, such agreements do not present the inherently repugnant obligations of the racially restrictive covenants in *Shelley*.

Further, the neighbors in *Shelley* were attempting to enforce the restrictive covenants against persons who were not parties to the original agreement.<sup>272</sup> Had the Court chosen to enforce the covenant and prevent the minority petitioners from taking title to the property, such action would rise beyond disinterested enforcement of a private agreement to the level of discriminatory state action against nonconsenting parties.<sup>273</sup> Persons suing for breach of reporter-source agreements, on the other hand, seek only to enforce the agreement against a reporter or news organization that was a party to, and that consented to, the agreement. Thus, unlike the black home buyers in *Shelley*, the reporter or news organization is able to negotiate the terms of the agreement and can choose not to enter it if the negotiations are unsatisfactory.

The fact that the home buyers in *Shelley* were not parties to the underlying agreements implicates the "neutral principles" rationale discussed by the appeals court in *Cohen I*.<sup>274</sup> Unlike the Court in *Shelley*, a court engaged in the enforcement of a confidentiality agreement is simply applying nondiscriminatory and neutral rules of contract law to support the agreement reached by the parties to the contract who are now both before the court. As the appeals court in *Cohen I* concluded, such action is not "active intervention" on the part of the state because it simply enforces the prior agreement reached by the litigants.<sup>275</sup> Though the neighbors in the *Shelley* case were asking the court to take an active role and enforce the covenants against third parties, the source in a reporter-source contract action is merely asking the court to apply the neutral rules of contract to reaffirm the previous agreement of the parties.

It is important to note, as well, that the Minnesota Supreme Court decision in *Cohen II* implicitly endorsed the "neutral principles" rationale with regard to a pure contract theory.<sup>276</sup> The *Cohen*

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<sup>272</sup> *Shelley*, 334 U.S. at 1.

<sup>273</sup> *Id.* at 19.

<sup>274</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 254-55 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*"). See *supra* notes 161-201 and accompanying text for a discussion of the neutral principles rationale.

<sup>275</sup> *Cohen I*, 445 N.W.2d at 255.

<sup>276</sup> See *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 204-05 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*"). The *Cohen II* court reasoned that:

*II* court rejected the contract claim, holding that the parties had no intention of creating a legally binding agreement.<sup>277</sup> The court, therefore, then analyzed the promise under a promissory estoppel theory, and concluded that the neutral principles logic could not be used in the context of promissory estoppel.<sup>278</sup> Because the neutral principles rationale was not applicable, the court found it necessary to consider the First Amendment.<sup>279</sup> Thus, if the court had accepted the contract cause of action, it presumably would have held that the neutral principles rationale applied and that it was not necessary to consider the First Amendment.

A similar observation can be made with respect to the United States Supreme Court's decision in *Cohen III*. There, the Court reasoned that the application of a promissory estoppel theory would involve state action because it would require the Court to impose obligations never explicitly agreed to by the parties.<sup>280</sup> By contrast, this reasoning does not apply where the parties have in fact agreed to keep certain information confidential and where the claim being considered is a pure contract claim rather than promissory estoppel. Thus, both the *Cohen II* and *Cohen III* courts' rationales with respect to the state action issue do not apply under a pure contract theory of enforcement.

Further, because important distinctions exist between tort and contract law, courts should not apply the rationale of the *New York Times* decision to find state action in the case of confidentiality agreements.<sup>281</sup> The *New York Times* Court held that the application

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the court of appeals, using a contract approach, concluded that applying 'neutral principles' of contract law either did not trigger First Amendment scrutiny or, if it did, the state's interest in freedom of contract outweighed any constitutional free press rights . . . . Under a promissory estoppel analysis there can be no neutrality towards the First Amendment.

*Id.* Thus, the Minnesota high court did not reject the neutral principles logic as the appeals court had used it, but held only that it could not be used in the promissory estoppel context. *Id.*

<sup>277</sup> *Id.* at 203. See *supra* notes 107-11 and accompanying text for a discussion of the Minnesota Supreme Court's reasoning with regard to the parties' intentions.

<sup>278</sup> *Cohen II*, 457 N.W.2d at 203-05.

<sup>279</sup> *Id.* at 204-05. See *supra* notes 121-30 and accompanying text for a discussion of the Minnesota Supreme Court's reasoning as to promissory estoppel and the First Amendment.

<sup>280</sup> *Cohen v. Cowles Media Co.* ("*Cohen III*"), 111 S. Ct. 2513, 2518 (1991). See *supra* notes 191-94 and accompanying text for a discussion of the *Cohen III* Court's reasoning as to state action in the promissory estoppel context.

<sup>281</sup> See *supra* notes 178-83 and accompanying text for a discussion of the differences between the tort law of defamation of the *New York Times* case and the contract law of the *Cohen* case.

of state defamation law by a court amounts to state action.<sup>282</sup> The district court in *Ruzicka v. Conde Nast Publications, Inc.*, which concluded that *New York Times* was applicable, stated, in summary fashion, that no important differences existed between tort and contract law and, therefore, that court enforcement of a reporter-source agreement was state action.<sup>283</sup>

The consensual nature of the contract, however, presents an important distinction from the law of torts that should be dispositive of the state action issue. The fact that a reporter has the ability to negotiate the terms of a confidentiality agreement allows him or her freely to choose the circumstances under which he or she will be subject to action by the courts. The defamation defendant, on the other hand, is confronted directly with the power of the state in the form of predetermined rules of tort liability. Where the rules of contract, then, represent mere mechanisms for the realization of private intentions, the rules of tort represent the public intentions of the state. A court's enforcement of a private reporter-source agreement under a pure contract theory, therefore, is not state action that would implicate the First Amendment.

Unlike *Shelley* and *New York Times*, the *Flagg Bros.* and *Evans* cases stand for the proposition that the mere neutral application of state law does not amount to state action.<sup>284</sup> The reporter-source problem, because it involves such a neutral application of contract law, is analogous to the *Flagg Bros.* and *Evans* cases.<sup>285</sup> Once again, the private and consensual nature of contract law involves no imposition of the state's will upon either party. Rather, it involves only the enforcement of the parties' own will as expressed in the original agreement. The after-the-fact action by the court in applying neutral principles of contract law is very much like the application of state trust law in *Evans* because it simply uses the rules of contract to enforce the will of the parties.<sup>286</sup> Indeed, *Evans* may have involved an even more active court than in the reporter-source context be-

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<sup>282</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

<sup>283</sup> 733 F. Supp. 1289, 1295 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991). The court said little more than "[t]he differences between tort and contract law do not justify a different result in this case." *Id.*

<sup>284</sup> See *supra* notes 161-70 and accompanying text for a discussion of the *Flagg Bros.* and *Evans* cases.

<sup>285</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 255 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>286</sup> *Id.*

cause the *Evans* Court imposed a remedy not provided for in the agreement.<sup>287</sup>

Careful scrutiny of the precedent in the state action area, then, reveals important differences between *Shelley* and *New York Times*, on the one hand, and the reporter-source confidentiality agreement on the other. In the end, the fundamental difference between them is the consensual nature of the reporter-source agreement, which affords both parties the opportunity to negotiate and exercise choice. Because this choice is available, the subsequent court enforcement should be viewed not as state action sufficient to implicate the Constitution, but simply as a mechanism for the realization of consensual private intentions.

Analysis of the waiver issue also reveals that the First Amendment does not apply to the enforcement of reporter-source agreements. Assuming that the court pays close attention to normal rules of contract law that require clear and definite terms in order to enforce an agreement, it is possible for a reporter to execute a valid waiver of his or her First Amendment rights.<sup>288</sup> An analysis of the case law on reporter-source confidentiality agreements reveals that, unlike other issues in the area of reporter-source confidentiality agreements, very little disagreement exists, among the courts that have considered such agreements, over the proper standard to apply regarding waiver.<sup>289</sup>

Courts considering reporter-source confidentiality agreements have applied the standard for waiver enunciated in *Erie Telecommunications, Inc. v. City of Erie*.<sup>290</sup> The appeals court in *Cohen I* found a valid waiver while the district court in *Ruzicka* did not.<sup>291</sup> That the courts differed on the waiver issue can be attributed to the vagueness and ambiguity of the agreement involved in *Ruzicka*, which did not allow the reporter involved to exercise a knowing and voluntary

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<sup>287</sup> *Evans v. Abney*, 396 U.S. 435, 444 (1970). The Court, applying trust law, terminated the trust and held that the property reverted to the late senator's estate.

<sup>288</sup> See *supra* notes 202-21 and accompanying text for a discussion of waiver.

<sup>289</sup> See *supra* notes 211-21 and accompanying text for a discussion of the standard for waiver that has been applied to reporter-source agreements.

<sup>290</sup> 853 F.2d 1084, 1096 (3d Cir. 1988). See *supra* notes 204-10 and accompanying text for a discussion of the *Erie Telecommunications* waiver standard.

<sup>291</sup> *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1298 (D. Minn. 1990), modified, 939 F.2d 578, 584 (8th Cir. 1991); *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 258 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*"). See *supra* notes 211-19 and accompanying text for a discussion of the *Cohen I* and the *Ruzicka* courts' waiver reasoning.

waiver.<sup>292</sup> Thus, the *Ruzicka* court may possibly have found a valid waiver given an agreement with clear terms like that in *Cohen*.<sup>293</sup> Neither the Minnesota Supreme Court in *Cohen II* nor the United States Supreme Court in *Cohen III* addressed the question of contractual waiver at all.<sup>294</sup>

Therefore, little disagreement has arisen, among those few courts that have considered reporter-source agreements, with regard to the waiver issue. Where the source can show that the *Erie Telecommunications* standard is met, that is, that the reporter has entered the agreement voluntarily and with a full understanding of the consequences, the reporter has validly waived his or her First Amendment rights.

Thus, because no state action is involved in the enforcement of reporter-source confidentiality agreements, and moreover, because the reporter can make a valid waiver of constitutional rights, the First Amendment should not prevent courts from enforcing these agreements. Even if the First Amendment interests are considered, however, courts must also consider the competing interests in enforcing the agreement and must balance the two.<sup>295</sup>

### B. *The Balancing Test*

A balancing of the need to enforce reporter-source confidentiality agreements against the burden on the First Amendment caused by such enforcement demonstrates the preeminence of the interests favoring enforcement. First, the First Amendment considerations are not as problematic as they might first appear, because one can view the making of these agreements as part of the editorial decision-making process rather than as a burden on that process.<sup>296</sup> Second, given a clear and unambiguous agreement that, if

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<sup>292</sup> *Ruzicka*, 733 F. Supp. at 1298. See *supra* notes 216–19 and accompanying text for a discussion of the particular facts in *Ruzicka* that precluded the magazine from making an effective waiver.

<sup>293</sup> See *Ruzicka*, 733 F. Supp. at 1298. The court reasoned, "[i]n *Cohen*, the terms of the purported waiver seem clear . . . [A]t least under the circumstances here, the agreement must specify the information which is not to be published in order for the waiver to be effective." *Id.*

<sup>294</sup> See *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 199 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>295</sup> See *supra* notes 222–65 and accompanying text for a discussion of how courts have defined and applied the balancing test.

<sup>296</sup> See *infra* notes 298–309 and accompanying text for a discussion of the minimal nature of the First Amendment burden.

breached, exposes the source to some form of harm, the interests in favor of enforcement are great.<sup>297</sup>

### 1. Minimal Burden on the First Amendment

The first rationale advanced to show that confidentiality agreements burden First Amendment rights is that such agreements burden the editorial decision-making process.<sup>298</sup> Upon close scrutiny, this argument is unconvincing because it creates an artificial distinction between confidentiality agreements and other kinds of editorial decisions. From a business standpoint, one of the primary resources of any news organization is information. Every day, news organizations make editorial decisions on how to obtain, process, analyze and present this resource. Thus, the media must decide whether to send reporters to cover a story, how best to assemble the information gathered by the reporter, whether to present that information to the public, and finally, how best to present that information. The decision on what news the public ultimately receives is based upon many things, including priorities as to what stories are most important, practical limitations such as how much space or time is available for another story, and business considerations regarding what will sell the most newspapers or attract the most listeners or viewers.

In this context, every news organization, through its reporters, must at times make sacrifices or promises as payment for valuable information. The choice to make such promises is a business decision involving calculated risks that the news organization hopes will yield a profitable return. Thus, entering a confidentiality agreement is really an extension of, rather than a restriction on, the editorial process. The choice, therefore, to promise not to publish some information, in order to obtain other information, is equivalent to the decision not to publish something simply because the editor thinks it is not newsworthy. In either case, the news entity, through its reporters or editors, has made a conscious business choice.

Moreover, this notion of choice echoes the idea that contracts are unique because of their consensual nature.<sup>299</sup> Because reporter-

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<sup>297</sup> See *infra* notes 310-38 and accompanying text for a discussion of the compelling nature of the interests favoring enforcement.

<sup>298</sup> See *supra* notes 250-58 and accompanying text for a discussion of how reporter-source agreements have been seen as burdening the editorial decision-making process.

<sup>299</sup> See *supra* notes 281-87 and accompanying text for a discussion of the consensual nature of the contract and its effect upon the state action question.

source agreements are consensual and because news organizations can choose not to be bound, such agreements do not hinder the editorial process. A court's subsequent neutral enforcement of the predetermined terms of agreement does not create any unforeseen obligations for either party.<sup>300</sup> Thus, the editor's freedom of choice is left intact.

Similarly, the argument that a news entity's uncertainty as to the terms of the agreement can cause an impermissible First Amendment burden is also unpersuasive upon close scrutiny.<sup>301</sup> As noted by the Minnesota Supreme Court in *Cohen II*, the problem of the indefiniteness or ambiguity of a particular agreement does not indicate a need for per se unenforceability.<sup>302</sup> Rather, such vagueness would simply argue against enforcing the particular contract involved.<sup>303</sup> Thus, to argue that vagueness or ambiguity creates a burden on the First Amendment is simply not a valid criticism of reporter-source confidentiality agreements where the particular agreement involved is not vague or ambiguous.

Moreover, if the terms of a particular agreement are ambiguous and would create a heavy burden on First Amendment freedoms, normal rules of contract requiring definite terms of agreement would serve to eliminate the particularly constitutionally burdensome claims without resort to a per se rule.<sup>304</sup> The district court's decision in *Ruzicka* is a good example of this contract law policing mechanism.<sup>305</sup> Because the court could not find clear terms of agreement, it held that a valid waiver of First Amendment protections could not have been made and refused to enforce the agreement.<sup>306</sup>

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<sup>300</sup> See *supra* notes 161-70 and accompanying text for a discussion of the neutral principles analysis as it applies to the state action issue. This note follows similar reasoning to conclude that court enforcement of a reporter-source agreement would place little or no burden on the First Amendment.

<sup>301</sup> See *supra* notes 254-58 and accompanying text for a discussion of how vagueness or ambiguity of an agreement can cause a burden on First Amendment freedoms.

<sup>302</sup> *Cohen v. Cowles Media Co.* ("*Cohen II*"), 457 N.W.2d 199, 203 (Minn. 1990), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*"). See *supra* notes 103-06 and accompanying text for a discussion of the Minnesota Supreme Court's conclusion that vagueness does not support a per se rule of non-enforcement.

<sup>303</sup> *Cohen II*, 457 N.W.2d at 203.

<sup>304</sup> See *supra* notes 103-06 and accompanying text for a discussion of how the problem of vagueness is simply a problem of proof that can be resolved through normal contract law principles.

<sup>305</sup> See *supra* notes 98-102 and accompanying text for a discussion of the *Ruzicka* court's handling of the vagueness issue.

<sup>306</sup> *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1298 (D. Minn. 1990), *modified*, 939 F.2d 578, 584 (8th Cir. 1991).



Finally, the argument presented by Judge Crippen in his *Cohen I* dissent regarding the private waiver of a public right is also unpersuasive.<sup>307</sup> Judge Crippen reasoned that the public's right to information could not be waived by a reporter.<sup>308</sup> Again, given that confidentiality agreements are part of the editorial process, no relevant distinction exists between a decision by a news organization to enter a confidentiality agreement and a decision by a news organization not to publish a non-newsworthy item.<sup>309</sup> Thus, unless Judge Crippen is willing to argue that news entities should never be able to select what information is to be published because news entities, by themselves, cannot waive the public's First Amendment rights, his argument is unpersuasive.

If reporter-source confidentiality agreements are regarded as extensions of the editorial process, as they should be, the arguments that such agreements place a heavy burden on the First Amendment are much less persuasive. The fundamental consensual nature of these agreements ensures that the news organization is free to exercise its business judgment on whether to enter the agreement. Thus, the burden on First Amendment rights is minimal.

## 2. Strong Need for Enforcement

Courts and commentators have advanced a variety of arguments demonstrating a strong need to enforce reporter-source confidentiality agreements.<sup>310</sup> Contract law problems, on the other hand, have led some courts considering such agreements to conclude that they should not be enforced.<sup>311</sup> Assuming traditional safeguards of contract law are observed, however, there is, on balance, a strong need to enforce these agreements.

The loss of confidentiality can cause serious harm to the source.<sup>312</sup> In *Cohen v. Cowles Media Co.*, the source, Dan Cohen,

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<sup>307</sup> See *supra* notes 259-62 and accompanying text for a discussion of Judge Crippen's argument.

<sup>308</sup> *Cohen v. Cowles Media Co.* ("*Cohen I*"), 445 N.W.2d 248, 267 (Minn. Ct. App. 1989) (Crippen, J., dissenting), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("*Cohen II*"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("*Cohen III*").

<sup>309</sup> See *supra* notes 298-300 and accompanying text for a discussion of the reporter-source confidentiality agreement as an extension of the editorial process.

<sup>310</sup> See *supra* notes 230-49 and accompanying text for a discussion of the arguments favoring enforcement of reporter-source agreements.

<sup>311</sup> See *supra* notes 92-139 and accompanying text for a discussion of the contract law problems surrounding the reporter-source agreement.

<sup>312</sup> See *supra* notes 239-40 and accompanying text for a discussion of how the loss of confidentiality can damage the source.

suffered the loss of his job and damage to his reputation.<sup>313</sup> Courts need to redress the damages caused by the breach of confidentiality agreements because they are often substantial.

Aside from damages to the individual source, the breach of confidentiality agreements can damage the news organization itself.<sup>314</sup> Reporters and their employers rely heavily upon confidential sources for much of the information that they receive.<sup>315</sup> Indeed, reporters traditionally felt obligated, both morally and professionally, to perform their part of the confidentiality agreement.<sup>316</sup> Recently, however, reporters have been more willing to breach confidentiality, exacerbating the reporter-source agreement problem.<sup>317</sup> Viewing these agreements as extensions of the editorial process,<sup>318</sup> if courts choose not to enforce them, in the long run, sources will no longer rely upon them.<sup>319</sup> The result, then, will be to take an important tool for the acquisition of information out of the hands of editors and reporters.

Also, the notion of allowing reporters to be shielded by such agreements, on the one hand, and allowing them to breach with impunity, on the other, is fundamentally inconsistent and troublesome.<sup>320</sup> If reporters are afforded the privilege of not being subject to normal contract law when they breach, their argument for having some special reporter-source privilege *not* to disclose is under-

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<sup>313</sup> *Cohen v. Cowles Media Co.* ("Cohen I"), 445 N.W.2d 248, 253-54 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199, 200 (Minn. 1990) ("Cohen II"), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("Cohen III").

<sup>314</sup> See *supra* notes 238, 241-46 and accompanying text for a discussion of the various ways in which a news organization's own interests may be damaged by a decision to breach a reporter-source confidentiality agreement.

<sup>315</sup> Dicke, *supra* note 3, at 1563. This commentator noted, "[j]ournalists regularly rely on confidential sources for a significant amount of the information they obtain' . . . [T]oday [1989], studies show that eighty percent of national news magazine articles and fifty percent of national wire service stories rely on confidential sources." *Id.*

<sup>316</sup> See *id.* at 1564-65. This commentator noted that "[j]ournalists have a long tradition of protecting their confidential sources . . . They fear that if they become known for breaching confidentiality agreements, existing and potential sources will 'dry up' . . . In addition, reporters feel a strong ethical and moral commitment to keeping their promises of confidentiality." *Id.*

<sup>317</sup> Langley & Levine, *supra* note 240, at 21-22.

<sup>318</sup> See *supra* notes 298-300 and accompanying text for a discussion of the reporter-source confidentiality agreement as an extension of the editorial process.

<sup>319</sup> See *supra* note 238 and accompanying text for a discussion of the possibility that sources will become reluctant to give information should courts choose not to enforce reporter-source agreements.

<sup>320</sup> *Cohen v. Cowles Media Co.* ("Cohen II"), 457 N.W.2d 199, 206 (Minn. 1990) (Yetka, J., dissenting), *rev'd*, 111 S. Ct. 2513, 2520 (1991) ("Cohen III").

mined.<sup>321</sup> Thus, the argument against enforcing such agreements has undermined other important interests of the news organization itself in two ways. First, not enforcing the agreement tends to take an important tool for information gathering out of the news organization's hands. Second, not enforcing the agreement tends to undermine the news industry's argument for refusing to reveal sources. This damage caused to news organizations, when coupled with the damage to the individual source, creates a powerful argument for enforcing reporter-source confidentiality agreements.

One might argue that if news entities are themselves damaged, the problem will police itself because the news entities will have an interest in keeping their promises. Though this argument may be true to some extent, there will certainly be times when, after weighing this possibility against their own desire to publish the confidential information, the news entity will still choose to breach the agreement. Cases will still arise, then, in which sources are injured. Moreover, this self-policing argument circumvents a central purpose of contract law—enforcing promises rather than permitting one party to choose when to breach its promises at the other party's expense.

With regard to any contract law problems that arise in the context of reporter-source agreements, a court's application of normal rules of contract law can adequately guard against such problems on a case-by-case basis.<sup>322</sup> For example, in *Cohen*, the defendant newspapers argued that the vagueness of reporter-source agreements should prevent courts from enforcing these agreements.<sup>323</sup> The Minnesota Supreme Court concluded, however, that such problems should be addressed only with regard to the enforceability of the particular agreement at issue and not all such agreements.<sup>324</sup> If a case, then, presents a clear offer, acceptance and consideration in which both parties know the specific consequences of their actions, the vagueness rationale simply does not apply.

An application of normal rules of contract will also suffice to guard against the problem of ascertaining the parties' specific in-

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<sup>321</sup> See *supra* notes 241–46 and accompanying text for a discussion of the way in which non-enforcement may undermine the news industry's argument in favor of creating a reporter-source privilege.

<sup>322</sup> See *supra* notes 92–139 and accompanying text for a discussion of the contract law issues.

<sup>323</sup> *Cohen II*, 457 N.W.2d at 203.

<sup>324</sup> *Id.*

tentions upon entering the contract.<sup>325</sup> If it is clear from the objective conduct or circumstances that either party did not intend to be bound, such an agreement would not be enforceable under normal contract law. If, on the other hand, both parties appeared serious about entering the agreement, the objective theory of contracts allows both parties to rely on the fact that the other party will perform or will be liable for breach.<sup>326</sup>

In *Cohen II*, the Minnesota Supreme Court decided that a true contract could not be found and went on, therefore, to consider promissory estoppel.<sup>327</sup> If, however, the court had found a true contract, there would be no need to consider promissory estoppel because a promissory estoppel analysis is used only to imply a contract in law where a contract in fact cannot be found.<sup>328</sup> The *Cohen II* court (as well as the *Cohen III* Court) also reasoned persuasively that under a promissory estoppel theory, it could not be neutral as to the First Amendment.<sup>329</sup> Where a court must consider whether it would be an injustice not to enforce the agreement, it must give up the cloak of neutrality and take up the sword of active intervention.<sup>330</sup> Because the promissory estoppel remedy requires the active involvement of the court in imposing an agreement upon the parties, both the *Cohen II* and *Cohen III* courts concluded that sufficient state action existed to implicate the First Amendment.<sup>331</sup>

Though the use of the promissory estoppel analysis involves such active intervention, this fact does not mean that the agreement is automatically unenforceable. As in any case where state action is found, the court must still apply the balancing test, weighing the need to enforce against the First Amendment concerns.<sup>332</sup> Indeed, given the minimal nature of the First Amendment concerns,<sup>333</sup> such a balancing test should often favor enforcement of the agreement.

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<sup>325</sup> See *supra* notes 107-15 and accompanying text for a discussion of the problem of determining the parties' intentions.

<sup>326</sup> See *supra* notes 112-15 and accompanying text for a discussion of the objective theory of contracts.

<sup>327</sup> *Cohen II*, 457 N.W.2d at 203-05.

<sup>328</sup> *Id.* at 203.

<sup>329</sup> *Id.* at 204-05; see also *Cohen v. Cowles Media Co.* ("*Cohen III*"), 111 S. Ct. 2513, 2517-18 (1991).

<sup>330</sup> *Cohen II*, 457 N.W.2d at 204-05.

<sup>331</sup> *Cohen III*, 111 S. Ct. at 2518; *Cohen II*, 457 N.W.2d at 204-05.

<sup>332</sup> See *supra* notes 222-65 and accompanying text for a discussion of the balancing test that is employed where a constitutional burden is discovered.

<sup>333</sup> See *supra* notes 298-309 and accompanying text for a discussion of the unpersuasive nature of the arguments demonstrating a First Amendment burden.

Moreover, as the United States Supreme Court concluded in *Cohen III*, the doctrine of promissory estoppel, given that it is a generally applicable rule that does not in any way single out news organizations, does not directly collide with First Amendment interests.<sup>334</sup> Rather, its impact upon the editorial process can be seen as an incidental consequence of applying the generally applicable rule to the press.<sup>335</sup> The press should not be granted special immunity from a generally applicable state law doctrine simply because of this incidental effect upon First Amendment interests.<sup>336</sup>

Though the Minnesota Supreme Court in *Cohen II* did not come to this conclusion, that court based its decision not to enforce under promissory estoppel on the particular facts of the case rather than on a fundamental incompatibility of reporter-source agreements with the promissory estoppel doctrine.<sup>337</sup> Indeed, the court noted that, given other facts, a promissory estoppel analysis might be applicable.<sup>338</sup> Thus, absent the "dirty tricks" in *Cohen*, and given that an injustice would have resulted if the agreement were not enforced, even the *Cohen II* court would have concluded that the need to enforce under a promissory estoppel theory outweighed any First Amendment interests. After *Cohen III*, however, it appears that any application of promissory estoppel in the reporter-source agreement context will be held not to violate the First Amendment given the generally applicable nature of the promissory estoppel remedy.

The decision whether to grant the promissory estoppel remedy in the reporter-source agreement context, then, should turn more upon the equities of the situation (as with any equitable remedy) than upon a concern for the First Amendment interests involved. While state action does exist because of the equitable character of the remedy, the Supreme Court's reasoning in *Cohen III* demonstrated that the First Amendment interests are really insignificant and tangential. The central issue to be decided is whether the aggrieved source involved deserves the equitable remedy. Once

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<sup>334</sup> See *supra* notes 57-69 and accompanying text for a discussion of the Supreme Court's reasoning in *Cohen III*.

<sup>335</sup> See *Cohen III*, 111 S. Ct. at 2519.

<sup>336</sup> *Id.*

<sup>337</sup> *Cohen II*, 457 N.W.2d at 205.

<sup>338</sup> *Id.* The court stated that "[t]here may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state's interest in enforcing the promise to the source outweighs First Amendment considerations, but this is not such a case." *Id.*

again, as with the difficulties regarding vagueness and the intentions of the parties, the problem of weighing the equities of the situation can and should be handled through the normal state law principles governing promissory estoppel. A *per se* rule barring enforcement of reporter-source confidentiality agreements through promissory estoppel is simply inappropriate and unnecessary given the lack of a real First Amendment burden.

Close attention to the state law rules of contract and promissory estoppel, then, will adequately guard against the various objections that courts and commentators have raised as grounds for not enforcing reporter-source confidentiality agreements. The problems of vagueness, intentions of the parties, and promissory estoppel, properly considered, demonstrate no need to impose a *per se* ban on enforcement of such agreements. Moreover, the interests in enforcing the contracts, both for news organizations and their sources, are great.

### 3. Result of the Balancing Test

The enforcement of reporter-source confidentiality agreements would place a minimal burden on the First Amendment.<sup>339</sup> Viewing confidentiality agreements as extensions of the editorial process, and given the consensual nature of such agreements, news organizations are free to choose exactly what information they will publish. Conversely, the need to enforce such agreements is often great.<sup>340</sup> Given a court's careful attention to contract law and given factual circumstances involving a clear agreement, breach and damages, the need to enforce substantially outweighs the minimal burden on the First Amendment.

## V. CONCLUSION

An analysis of reporter-source confidentiality agreements indicates that they should be enforced in the same manner as other business agreements. First, the consensual nature of contracts, which allows news organizations the freedom to decide when, and on what terms, to enter an agreement, means that court enforcement of such agreements does not rise to the level of state action

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<sup>339</sup> See *supra* notes 298-309 and accompanying text for a discussion of the unpersuasive nature of the arguments demonstrating a First Amendment burden.

<sup>340</sup> See *supra* notes 310-38 and accompanying text for an analysis of the interests favoring enforcement of reporter-source agreements.

sufficient to implicate the Constitution. Second, even if state action exists, little disagreement has arisen among courts construing such agreements that, given clear contractual terms, a reporter may effectively waive First Amendment rights by entering the contract.

Finally, if the First Amendment is nonetheless held to apply, a balancing of the First Amendment burden against the need to enforce calls for enforcement of the agreement. The burden on the First Amendment, given the reality that confidentiality agreements are simply extensions of the editorial process, is not as great as it first appears. Conversely, the harmful effects of not enforcing the contract, both to the media and to the source, are substantial. Assuming close attention to the state law rules of contract and promissory estoppel, the balancing test indicates that courts should enforce reporter-source agreements in the same manner as with any contract.

Under any of these lines of reasoning, then, the reporter-source confidentiality agreement should be both enforceable and enforced. Special immunity from the law should not be given to reporters and news organizations in any context, absent a real First Amendment burden.<sup>341</sup> Such a burden simply does not exist in the case of reporter-source confidentiality agreements.

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<sup>341</sup> Judge Yetka's dissent in *Cohen II* contained a strong objection to extending special immunity from contract law to reporters:

[C]ontract law, it now seems, applies only to millions of ordinary people. It is unconscionable to allow the press, on the one hand, to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable.

*Cohen II*, 457 N.W.2d at 206 (Yetka, J., dissenting).